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IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

KAY T. NUNNALLY, INDIVIDUALLY
AND ON BEHALF OF ALL WRONGFUL
DEATH BENEFICIARIES OF JOSEPH
LEE NUNNALLY, DECEASED — PLAINTIFF

V. — CIVIL ACTION NO. CV92-270-CD

R. J. REYNOLDS TOBACCO
COMPANY AND BASIC FOODS, INC. — DEFENDANTS

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DATE: July 11, 2000

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Mr. Merkel

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JUDGE CARLSON: Be seated, please. Good morning. Ready for the jury now that we've had the overnight recess?

MR. LISTON: Judge, we have several objections to portions of this deposition that Plaintiff has said they're going to read. We can take them up now before the jury comes out, or I can just make them during the course of the reading of the deposition.

JUDGE CARLSON: It might be better to take them up now. I need -- I need to see the deposition, see what we're talking about. I'm not sure if I've ever heard the name. Who is the deposition of?

MR. MERKEL: Dr. Routt, Your Honor. He's the pathologist from Memphis.

MR. LISTON: These were filed, along with some others, back on the 23rd of June. The first one, Your Honor, is on page 47, line 9 through page 48, line 2, should be marked there.

JUDGE CARLSON: Okay. Tell you what, why don't we handle it this way. Since it's so far over in the deposition, just like the other testimony, I might have a better feel for it when we get to that point, but if I know what the objection is, and what

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the Plaintiffs' position is, then I can be thinking about that as we get to it.

MR. LISTON: All right, sir. Our objection is it's hearsay. He's asking the Doctor to read from a record that contains the conclusions of a witness not before the Court.

MR. MERKEL: And my response, simply, Your Honor, it's part of the medical record. And doctors do that all the time, rely on consulting reports and radiology reports and all that type of thing. I don't think it's any different than any other.

JUDGE CARLSON: That's the objection, it goes on over to line 10 on page 48?

MR. LISTON: To line 2 on page 48. Then the next one begins at page 50, line 24 through page 51, line 18. And that is an objection to the form. It calls for the witness to speculate. And also the witness previously stated on direct examination that he did not have any conversation with Dr. Courington.

MR. MERKEL: And again, Your Honor, he's just drawing a conclusion based on the medical record and saying both names are on it. That means they both consulted, and he does the same thing.

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Again, I think it's just an interpretation of a medical record by a medical practitioner.
JUDGE CARLSON: All right.
MR. LISTON: The next one is page 51, line 24, from page 52, line 16.
JUDGE CARLSON: All right.
MR. LISTON: And the objection is that the witness was not qualified as an expert in cancer causation. And he had stated earlier that he did not have an opinion with respect to Mr. Nunnally specifically. And therefore, it would not be relevant for the witness to testify with respect to the issue of general causation in a case.
MR. MERKEL: Again, Your Honor, he's a pulmonologist. I think he's certainly qualified to testify. He's not trying to testify about Mr. Nunnally. He's just saying that the only opinion he gives is that there is a link between cigarette smoking and lung cancer. Certainly a pulmonologist is entitled to state, I think.
MR. LISTON: This guy is a radiologist.
MR. MERKEL: Excuse me, radiologist. Well, we had Dr. Lang here stating all kind of opinions about same things, Your Honor, he's a radiologist too and primarily a gynecological one.
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So --
JUDGE CARLSON: The next one is on page 53, is that --
MR. LISTON: Line 5 through 53, line 25. Objection to the form of the question. Because the question is vague as to what is meant by the phrase "heavy smoker" in the question.
MR. MERKEL: And I don't think the answer, as it's read, Your Honor, has any bearing to some quantitative description of the term "heavy." It more goes to length. He says the longer one smokes and the greater volume one smokes, the greater risk one has. That, again, is just a statement of what we've gotten from every witness in the case so far from both sides.
JUDGE CARLSON: That's all?
MR. LISTON: That's my only copy. May I get you another copy if you'd like to follow?
JUDGE CARLSON: If I can just have one marked so I can be --
MR. LISTON: Just go ahead and use mine. We can't find another one.
JUDGE CARLSON: Is this the only copy you have, Mr. Liston?
MR. MERKEL: Will you read Engram's
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questions?
MR. LISTON: Yeah, I'll read them.
MR MERKEL: Okay, so give the Judge this one.
JUDGE CARLSON: Are the objections marked on that?
MR. MERKEL: They may not be. If not, just give Bill that one.
JUDGE CARLSON: Looks like the highlighted portions are the portions being read; is

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that correct?
MR. MERKEL: No, Your Honor. It's all being read. I don't know what we gave you. I guess I highlighted for my own purposes, or that's Bill's copy you've got.
MR. LISTON: We had, at one time, thought about using it.
JUDGE CARLSON: Okay.
(Jury enters courtroom.)
JUDGE CARLSON: Good morning, ladies and gentlemen. Again, I hope you had a good evening, ready to go. And since you've had the overnight recess, once again, I need to inquire of you have you had occasion to talk to anyone about the case, any outside information gained about the case,

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anything you need to bring to my attention?
Again, I take it there's been no contact or discussion or outside information received on the case, so we're ready to go forward at this time. What says the Plaintiff, Mr. Merkel?
MR. MERKEL: We call by deposition Dr. William Routt, pathologist.
JUDGE CARLSON: Again, ladies and gentlemen, you understand about a deposition and how it will be presented to you by way of a reading of the deposition, the questions and answers.
MR. MERKEL: Your Honor, Mr. Engram for the Defendant did the first questioning. So Mr. Liston will read his questions, and then Mr. Dodson will read ours.
(Deposition of Dr. William Routt read into the record.)
MR. LISTON: Could you indulge us just a second, Your Honor.
JUDGE CARLSON: Let me just mention here if this will help, and I'll mention to the jury, ladies and gentlemen, that before you came out there were about two or three objections to certain portions of the deposition. Just like throughout the course of the trial, you've heard objections

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propounded to the witnesses on the witness stand, and I had to make rulings on whether or not those questions would be answered.
So there are a few matters here that came up that I mentioned to the lawyers, just like the testimony of witnesses I feel like I'd have a better feel for the appropriate ruling to make that if we wait until we got to that portion of the deposition, and then the objection can be made. What I can do when we get there, I'll stop and make the ruling. I assume that's what you were doing, Mr. Liston was marking objections?
MR. LISTON: Yes, sir, but we found another copy in the meantime. What page are you starting on now?
MR. MERKEL: On line 14, page 42.
(Continuation of the reading of the deposition of Dr. Routt.)
MR. LISTON: May it please the Court, that's our first objection on the grounds that we set forth in our filed objections of June 23rd.

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JUDGE CARLSON: The objection has been noted for the record and earlier was stated into the record. I'll overrule that particular objection.

(Continuation of the reading of the deposition of Dr. Routt.)

MR. LISTON: May it please the Court, we object to the testimony from line 24, page 50, through line 18, page 51 for reasons previously stated.

JUDGE CARLSON: And I'll sustain that objection, so that portion will be deleted from line 24 on page 50 down to -- through line 18 a page 51. That brings up the next objection which will be overruled as to line 24, page 51, down through line 16, page 52. Pick up with line 24 on page 51.

(Continuation of the reading of the deposition of Dr. Routt.)

JUDGE CARLSON: Let me stop here. I think there was an objection which I was prepared to overrule.

MR. LISTON: It is, Your Honor.

JUDGE CARLSON: I think based on the question and response, I'll overrule the objection. That goes to line 5, page 53, down through line 25 on page 53.

MR. LISTON: Thank you, Your Honor.

(Continuation of the reading of the deposition of Dr. Routt.)

MR. DODSON: That's all I've got.

MR. LISTON: Redirect, Your Honor.

JUDGE CARLSON: All right.

(Continuation of the reading of the deposition of Dr. Routt.)

MR. MERKEL: Your Honor, we would have nothing further in rebuttal.

JUDGE CARLSON: All right, ladies and gentlemen, then, with that announcement, that will conclude the presentation of the evidence in this case. So in a moment, based on what I mentioned to you yesterday, I will go ahead and give you a recess. And yesterday afternoon I talked with the lawyers a little bit about a time frame, and I'm going to make a statement, and see if there's any strong disagreement with the estimation.

I believe if I let you go now and have you come back at 12:30, that would give us time to, number one, go through jury instructions. And then, number two, let everybody take a lunch break and also get everything ready to go for closing argument and the final summation to you. Is there any disagreement with that estimation? And I think that would be, hopefully, realistic, so that everybody could be ready for you at 12:30.

So when you come back at 12:30, then at that point, of course, you'll be put in the jury box. I'll read the law to you. I don't expect you to commit to memory the law that are read to you, I believe if the law is read to you beforehand, even though you'll have it in writing back in the jury room, it will aid you to have at least a general

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knowledge of the law as you listen to the lawyers talk to you in their final remarks. After I read the law, again, the lawyers do have the right to talk to you one final time in their summation. And then after that, you'll get the case for deliberation.

So at this point, I'll put you in recess. Let me mention to you, also, that certainly you'll want to go ahead and eat lunch before you come back, and we'll start up at 12:30. The only reminder, please, is to not talk to anybody about the case or gain any outside information about the case. So it's 9:40, so if you'll be back in the jury room by 12:30, and I plan to put you in the jury box at that time.

JUROR: Will the alternates be dismissed at that time?

JUDGE CARLSON: When you come back, when you get the case for deliberation, it's a good

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chance some of you if not all of you will be released when the jury retires to deliberate. So that's where we stand at this point, so hopefully you'll have an idea on where you stand. Thank you.

(Jury exits courtroom.)

JUDGE CARLSON: I believe that's all the jurors. Let me mention while I'm thinking about it along the lines of what one of the alternate jurors asked, I think Mr. Merkel and Mr. Dodson fell victim to not having any alternates in a civil case in the last year, couple of years.

Under the law, the statute says that -- I attempted to get this amended in the Legislature this session to no avail -- but the Alternate Juror Statute states that alternate jurors shall be released at the time the jury retires to deliberate. And I attempted to have that amended, and hopefully it will be reconsidered next year. I think in today's time, especially with the possibility of bifurcated trials that can go on for, literally, days after the jury initially retires to deliberate, we release the alternates at the very beginning, understand at least the possibility of a mistrial if something happens to one of the jurors. So I continue to follow the law, and that is to discharge

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the jurors.

Up until a few years ago, I'd hold on to the jurors and utilize them if I had to. And the first time it got raised on appeal that I used an alternate juror because a juror had to be dismissed during regular deliberation, the Supreme Court stated that could not be done. The statute says they have to be released. So I still routinely dismiss alternates at the time the jury retires to deliberate. The only way I hold on to them here, if the parties agreed. I think in Mr. Merkel's case both sides agreed to hold on to the alternates. I said no, burn me once but not twice. The Supreme Court said I can't do it.

So I released them, something happened during deliberation and a juror had to be excused. And a mistrial had to be declared. I say that to

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let all the lawyers know you might be thinking about that. If there's any objection to holding on to the alternates, I can guarantee you they're going to be released as soon as the jury retires to deliberate.

MR. ULMER: Your Honor, we request that the statute be adhered to. That the alternates be when released when the jury retires to consider its verdict.

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JUDGE CARLSON: If there's any objection, certainly that would be the case. The Supreme Court, at least the last one I read, which involved a case over which I presided, the Supreme Court says that's still the law. And the statute has to be adhered to.

On the matter of jury instructions, I'm going to step down in a moment, and let the lawyers kind of regroup and go over the jury instructions. I'll mention that, of course, under the Circuit Court rules, the Court can initially consider up to six instructions on the substantive law. As a matter of practicality and case law says that certainly the bottom line is the Judge has to make sure the jury is adequately instructed on all areas of the law.

So after we follow that procedure, if there's still an area of the law that is uncovered, then certainly the Court will consider any additional instructions. But I hope we can pare them down, get right to the meat of the coconut, and get the basic law to the jury. I would ask the lawyers to spend a few minutes to see now that all the evidence is in, to realistically evaluate the instructions. To see which ones, might in all

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fairness, be withdrawn. Which ones need, in all fairness, to be given by agreement, and which ones truly need to be dealt with by the Court as far as any objection of one side or the other. Let me give you a few minutes to go through that, and then we'll take up jury instructions.

MR. MERKEL: Your Honor, does the Court have some standard charges such as burden of proof, and proximate cause and things like that that neither of us need worry about?

JUDGE CARLSON: Right. Let me ask, if you could get copies of these instructions, one for each side, and that will be passed to you. That will help you as you go through your instructions, what needs to be done. I'll step down for a few moments. And check on you in a few minutes after you've had time to go through your instructions and see where you stand. I believe this is Mr. Liston's copy of the deposition here.

(A short break was taken.)

JUDGE CARLSON: We just need to stay on course. We've got a -- as far as I'm concerned, we've got a deadline. Because we've told that jury, I told the jury they're being put in the box at 12:30. And I know from experience, and I believe

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you lawyers do, too, that, you know, if we disappoint them here, then they're going to take it

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out on somebody. I don't know. They may take it out on me. That's fine, but they may take it out on somebody. So I think we need to move through these jury instructions. Any objections to the Court's instructions, C-1 through C-10 or C-11? Excuse me.

MR. BELL: For the Defendant, no, Your Honor.

MR. MERKEL: Your Honor, no objection to any of it. Just would point out that in the Court's instruction C-4 which is the burden of proof and preponderance of the evidence, this case will have claims of both parties. Their comparative negligence claim should be incorporated that they have the burden on that matter. But I think yours has all the blanks to do that, but it just hasn't been done.

JUDGE CARLSON: All right, sir. C-1 through C-11 will be marked and given. I'll make those changes. Let me find out, then, as to are there any instructions that the parties have agreed ought to be given? Any by agreement on either side?

MR. ALDEN: I think there were.

MR. MERKEL: I think there are five --

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four or five, Your Honor, that we've agreed with some modifications. And we've agreed what the modifications are.

MR. ALDEN: I think D-6 is one.

JUDGE CARLSON: Let's find out what they are, and if somebody can be working on those modifications.

MR. MERKEL: D-5, is one, Your Honor, with modifications.

JUDGE CARLSON: Hold on.

MR. MERKEL: D-6 is one with modifications. I think that we've agreed, have we not, that D-2 is covered by the Court's and can be withdrawn?

MR. BELL: That's correct.

JUDGE CARLSON: We'll go through the withdrawn in a moment. Let me make sure which ones are agreed to then.

MR. MERKEL: I think D-15 is covered by the Court's, and I think we're all in agreement that that --

MR. ALDEN: That's right, Your Honor.

MR. MERKEL: -- won't be necessary.

JUDGE CARLSON: Are we getting into the withdrawn then?

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MR. ALDEN: Yeah.

MR. MERKEL: Yes, sir.

JUDGE CARLSON: Are there any others that you've agreed to that can be given?

MR. MERKEL: There are some, Your Honor.

JUDGE CARLSON: So far I've got D-5 and D-6 is with modifications.

MR. MERKEL: And D-20, I think, is another that's covered by the Court's. D-21 --

JUDGE CARLSON: Let's just go through the withdrawn. Let's go through the withdrawn first. Maybe that's the best way to do it. Are there any to be withdrawn by the Plaintiff? I know as I --

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MR. MERKEL: Proximate cause, I think, Your Honor, is covered by yours, so our P-1 would be withdrawn.
JUDGE CARLSON: Okay. And --
MR. MERKEL: The rest of ours, Your Honor, will stay as are. P-1 is covered by the Court.
JUDGE CARLSON: I'll pull out P-5 anticipated as a punitive damage instruction.
MR. MERKEL: Yes, sir. That was withdrawn from this phase, obviously.
JUDGE CARLSON: We're looking at P-2,

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P-3, P-4. What about from the Defendant's standpoint, then, which ones would be withdrawn?
MR. ALDEN: D-2, as we already said.
JUDGE CARLSON: Okay. D-2 is withdrawn.
MR. ALDEN: D-15.
JUDGE CARLSON: D-15?
MR. ALDEN: That's correct.
MR. ALDEN: D-20.
MR. BELL: I'm not sure D-20 is covered, Your Honor, by the Court's instructions. There's one statement about --
MR. MERKEL: Covered in the third paragraph on the first page of the Court's instruction.
MR. BELL: There's --
JUDGE CARLSON: All that's covered.
MR. BELL: Ours went just a little bit further, Judge.
MR. ALDEN: We'll withdraw D-20.
MR. ULMER: We'll withdraw it, Your Honor.
JUDGE CARLSON: Okay. Does that cover the withdrawn?
MR. ULMER: No, there's one more. I think D-23, Your Honor, is the nine person verdict.

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Is that in the Court's?
JUDGE CARLSON: Yes, sir.
MR. ULMER: We would withdraw, then, D-23.
MR. ALDEN: We received a new P-2, P-3A and P-3. Does that mean that old P-2 and old P-3 are withdrawn?
JUDGE CARLSON: I haven't seen them yet. All I've got is P-2, P-3 and P-4. I don't have any "A" instructions.
MR. DODSON: Here they are.
JUDGE CARLSON: Have they been marked filed by the clerk?
MR. DODSON: No.
JUDGE CARLSON: P-2 and P-3 are withdrawn?
MR. MERKEL: Yes, sir, the original versions are, Your Honor. P-3A there and --
JUDGE CARLSON: To keep the record straight, the original P-2 and P-3 are withdrawn, so we better make the new ones an A instruction.
MR. MERKEL: Yes, sir.
JUDGE CARLSON: Okay. So P-2A,
MR. MERKEL: P-2A, P-3A, and I guess

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P-3B.

JUDGE CARLSON: Okay. I'll mark P-2 -- the new P-2 as P-2A, the new P-3 as P-3A and the new P-3A as P-3B. Okay. That's it. I take it there's no agreements on anything else?

MR. ULMER: Your Honor, there are several jury instructions offered by the Defendant that, based on the Court's prior rulings in the case, will likely be refused. So I mean, we'll -- they'll be obvious when we get to them. But other than that, I don't think there's anything we can withdraw at this point.

JUDGE CARLSON: What about P-2A then?

MR. ALDEN: Your Honor, we object to this on the ground that it essentially attempts to minimize the separate defective condition requirement. It mentions that it once at the beginning. But then it goes on and says in risk utility they're determining only whether the product is unreasonably dangerous. And then it goes on, and it talks about a single risk utility factor, namely the Plaintiffs' appreciation of the danger. But it doesn't give all the risk utility factors.

And in that sense, I know that what they've got there was a quote from "Prestage", but it was in the context of a "Prestage" Court

considering that precise issue. The "Prestage" Court did not say this one factor, the Plaintiffs' appreciation of the danger deserved particularly highlighting. In fact, the "Prestage" Court as we discussed at some length in a footnote said that the following seven factors are the ones that a Court may consider in making a risk utility determination. So we object in that it essentially eliminants the separate requirement of defect, and that it doesn't adequately define unreasonably dangerous.

JUDGE CARLSON: Let me find out -- what's the response, please, sir? Where are those cases that were up here? All right.

MR. MERKEL: The "Prestage" case, Your Honor, in a footnote, lists the seven factors that -- this is in footnote 3 and says, "In balancing a product's utility against risk of injury creates a trial court may find it helpful to refer to seven factors enumerated in John Wade's article" on so and so, and then it lists the seven factors.

Now, that, of course says the trial court can consider them. I assume that the jury can as well consider them. They have an instruction which asks for those seven factors. So I think ours, as it is, with -- before the "however" phrase at the

bottom, if we inserted the seven factors as with the preamble of the "Prestage" Court gives it. In other words, these are not -- on theirs, they lead into it a different way, but what it says, "In balancing a product's utility against the risk of injury it creates, you may consider the following seven factors" would be what I would suggest should go there.

And we don't have any problem with the

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seven factors. They've asked for them or they've asked for six of them. And we -- and we don't have a problem with that, but I think that in addition to what we've got on P-2A is the entire ball of wax and follows "Prestage" exactly, and that is the law that is applicable in this case.

JUDGE CARLSON: Are you saying a P instruction and a D instruction need to be given on this point? They become the Court's instructions when they're given, so we need to get pretty focused for the jury.

MR. MERKEL: Yes, sir. I think if you inserted their D -- let me find it.

MR. ALDEN: 10, I believe it is.

MR. MERKEL: Okay. Their D-10, and it has the wrong preamble up there. It says, "In

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deciding whether or not Reynolds' cigarettes smoked by Nunnally were unreasonably dangerous," and that's not what the factors are. The factors are in balancing a product utility against the risk of the injury it creates is what the factors go to. But I'm suggesting after our number 5 -- right.

Before the list of 1, 2, 3 from a preponderance of the evidence of sentence, right after the second paragraph, if we then inserted, in balancing a product's utility against the risk of injury it creates, the trial court may -- I mean, you may consider, and list the factors. And end up, accordingly if you find from a preponderance of the evidence that 1 through 5, then that would complete the instruction.

JUDGE CARLSON: Unless I'm missing something, there's not a whole lot of disagreement on it. Why can't we combine?

MR. MERKEL: That's what I'm suggesting, Your Honor.

JUDGE CARLSON: And try -- let me go back, Mr. Alden, and find out what the specific objection is to P-2A. Are you talking about the second paragraph there?

MR. ALDEN: I am, and if you take out the

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second paragraph, it's substituted in our D-10 as the definition of unreasonably dangerous. I think that would satisfy us on unreasonably dangerous. We have a separate instruction I guess we can been fight over it when we get to it, about the fact that we still think that defective is a real requirement.

MR. MERKEL: Again, Your Honor, the risk utility analysis of a product is what's used to see if it's unreasonably dangerous. And then the factors, there's not the test, but the factors are how you apply the test. So the second paragraph still should be there, and on page -- if you'll look on page -- page 254 of the "Prestage" decision, under the risk utility analysis heading, it has the exact language verbatim that we have in the second paragraph there.

MR. ALDEN: And that's right, Your Honor, but that was in the context of considering and rejecting the consumer expectations part that used to be an alternate test for risk utility. And here

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they've elevated in the second sentence of the second paragraph, "Thus even if a Plaintiff appreciates the danger of a product."

What was the Supreme Court's analysis about why it should adopt risk utility into making

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it a part of the test, itself. And that isn't what should go to the jury. What we're saying is the tests should go to the jury. The test is the intent, and that is a test only for how you determine unreasonably dangerous.

MR. MERKEL: No, Your Honor, it's a test for how you appraise risk utility. They're trying to write risk utility out of the equation completely. If you take paragraph 2 out, there's nothing that mentions risk utility anywhere. And that is the analysis that the jury should make. And all the seven factors do is tell them you may consider these seven things in performing a risk utility analysis, but they have to be told about risk utility.

MR. ALDEN: Your Honor, we don't object to them being told about risk utility in the context of the term unreasonably dangerous which is the only place that it applies. And if they want to use the first sentence of their second paragraph, we don't have a problem with that. But what we want to do is get rid of the second sentence that unfairly elevates one factor, because it's coming right out of the Supreme Court case that was determining it for other reasons. And we want to substitute in the

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real definition of unreasonably dangerous which is D-10.

JUDGE CARLSON: Hold on just a minute. It would seem to me, again, keep in mind that it becomes the Court's instruction once it's given, regardless of who submits it. To try to be fair to the parties in making sure that the jury is adequately instructed, I think we could take care of it by -- and really, it's almost a comment going too far, that second sentence in the second paragraph, the Court interject being itself into commenting. And I think that goes a little bit too far. I don't think that second sentence is needed.

So the first paragraph of the first sentence of the second paragraph, and then kind of combining the two. I think that's what --

MR. ALDEN: Then put in D-10.

JUDGE CARLSON: Right.

MR. MERKEL: Well, again, Your Honor, D-10 needs a different preamble. It needs to give what the test is for, which is balancing a product's utility against the risk of injury it creates.

MR. ALDEN: That's already in the first sentence.

MR. MERKEL: I know, but that's what the

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factors are for. The factors don't go towards unreasonably dangerous.

MR. ALDEN: The Supreme Court says in a risk utility analysis, a product is unreasonably dangerous. It is the unreasonably dangerous test.

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The Supreme Court --
JUDGE CARLSON: In the footnote, and that's where the Supreme Court shows to put the factors, you know, as discussed, I think in Professor Wade's article. But the lead in paragraph in footnote 3 on page 256 of "Prestage" is "In balancing a product's utility against the risk of injury it creates, the trial court" -- well, I mean that --
MR. MERKEL: I think at that point, Your Honor, we simply say you may consider the following factors.
JUDGE CARLSON: Put the jury in place of the trial court. That's what it says. I don't see the problem.
MR. ALDEN: It is, but it also says that what the risk utility is for on page 254 is determining the defined term and the term of art "unreasonably dangerous." When it's -- on 254 when the Supreme Court starts the heading risk utility

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analysis, in a risk utility analysis, a product is "unreasonably dangerous" if a reasonable person --
MR. MERKEL: We've got that immediately above, Your Honor. That's the paragraph of the sentence that's still left in paragraph 2, exactly what he's saying.
MR. ALDEN: I guess I'm confused about what we're fighting about.
JUDGE CARLSON: I am, too.
MR. ALDEN: That makes at least two of us.
JUDGE CARLSON: Let's do this. Let's go with looking at P-2A starting out in the first paragraph, the first sentence of the second paragraph. And then insert there the lead in language and footnote 3 appearing on page 256 of "Prestage." And then pick up there with the factors asset as set out in D-10 which the Plaintiff said it had no objection to. The six factors versus the five factors being placed there at that point.
MR. ALDEN: Actually, I think there are seven.
MR. MERKEL: We think, Your Honor, all seven factors should be in it, but we have no objection to the six they have. I mean, we think

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the seventh one is equally part of it.
JUDGE CARLSON: I don't think anybody referred to that during the trial.
MR. ALDEN: And it deals with insurance.
MR. ULMER: And it deals with insurance, Your Honor.
MR. MERKEL: I don't care about the word "insurance," Your Honor. But I think definitely the factor that the company is in better shape to build into its price and so forth. This factor is an important part of it. That's definitely a consideration that underlies product liability law.
MR. ULMER: Well, I have never, in my experience, ever had the seventh factor go to the jury because of the referenced insurance, because of the social policies that are set forth in seven. I

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mean, the six factors describe the risk utility analysis, and describe how you arrive at unreasonably dangerous. So we object to factor number 7 going to the jury, Your Honor.

JUDGE CARLSON: What about putting a period after the word "product," taking out "for liability insurance."

MR. MERKEL: That's what I'm suggesting, Your Honor, I certainly would be reluctant to put

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liability insurance even though the Court does. I think that they can spread the risk by setting the price of the product is definitely a factor to be considered.

MR. ULMER: We object to that, Your Honor.

MR. ALDEN: We object. Just because you don't use the word "insurance" doesn't mean the rest of the instruction describes the precise concept of insurance, although it doesn't use the word until the end of it.

JUDGE CARLSON: I see no problem, one of it's one of the factors, put a period there after work product and strike the rest. Are we together then on how we're going to combine P-2A and D-10?

MR. MERKEL: Your Honor, we could add it -- we've got it on this, and Jack could add that to ours if you want while we're going on to something else.

JUDGE CARLSON: That will be fine, before we break for lunch or take a break before the jury gets back, everybody can look at it and make sure there's an agreement on it and not come back at 12:30 and still be haggling over it. All right. P-3A, what about P-3A?

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MR. ALDEN: Your Honor, we think both P-3A and P-3B should not be given. The Supreme Court in "Hunter" said that when you talk about a negligent design case, you have a single standard, and it's under "Prestage." That's what we just got done fighting about. There's no separate negligence concept here. And if you look at what they're talking about is they're trying to revive long dismissed claims.

I mean, the fact is we are a product manufacturer. To define the duty of a product manufacturer to its consumers, you have to have it defined in terms of the product. It can't just be free form as they have in sub 2. It has to be a kind of a defect for a product manufacturer to be negligent. And it has to be a manufacturing defect which we don't have. Has to be a warning defect which has been dismissed, or it can be a design defect.

When you get into design defect, the Supreme Court tells you in "Hunter" that's the "Prestage" factors and that the strict liability design defect test. Because what it really does is evaluates the manufacturer's conduct in making their decision is a negligence test. So what the Supreme

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Court has told you in "Hunter" is you've already

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given in the design context, a negligence design context, the negligence instruction. You don't need a separate negligence claim.

And specifically, this negligent claim, if you look at 2, so we object to its entirety on that basis. We think it's taken care of, and there's no need for either P-3A or P-3B. If you look at sub 2 of P-3A, what is the jury supposed to do with that? "The negligent in the marketing of cigarettes?" What does that mean? Does that mean we did not warn? The jury could certainly infer that. That is a claim that is gone. Does that mean we made them improperly? Jury could certainly infer that. That's a claim not here. If it means only that we negligently designed them, that's a claim that we've already taken care of.

Going to P-3B, I don't recognize this instruction. This isn't the case we just tried. If you look at number 2, they talk about marketing cigarettes from 1954 through 1966.

JUDGE CARLSON: Let me just make sure. I've got them marked in reverse. I've got P-3A as one that talked about '54 to '66, and then P-3B is the shorter of the two. In other words, I think --

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looking at paragraph two, the --

MR. ALDEN: Everything I said, I'm embarrassed.

JUDGE CARLSON: All right. P-3A is the one I have in paragraph 2 that has 1954 to 1966. I've got that marked P-3A, and then the shorter one is P-3B.

MR. ALDEN: Let me start over, at least when I'm talking about their specific instructions. The one I most don't recognize is P-3A. P-3A starts out in paragraph 2 talking about "We were negligent in marketing cigarettes from 1954 to 1966 with the knowledge that beginning smokers would become addicted and habituated." It in then injects the notion of youth marketing. It injects the notion of why Joe Nunnally started that nobody proves had anything to do with us.

It deals with the time period, '54, when Joe Nunnally was two. It ends in '66, which I'm not clear why it does. It seems like this is a warning claim. What it's saying we were negligent for marketing without telling people that cigarettes are addictive, or they cause cancer. That's a warning claim.

To go on. The next paragraph talks about

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we were negligent tor designing a lower tar cigarette which was less hazardous and not encouraging smokers to use them exclusively. That, again, is a warning claim. They're saying right here we should have encouraged smokers to use those cigarettes. But also, there's absolutely no testimony here that, first of all, low tar cigarettes, while they're safer, that they would have prevented Mr. Nunnally's injury.

Plaintiffs, in fact, have admitted in a binding fashion, that they have no feasible alternative design that would have prevented

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Mr. Nunnally's injury. They also, the only testimony we have in this case, is that we were barred by law from encouraging smokers to use low tar cigarettes. That's what Dr. Townsend testified to, and there's absolutely no evidence on the other side to rebut that.

So this bears no resemblance to the testimony in the case. The next one is Reynolds was negligent for not removing the more dangerous higher tar cigarettes from the product line. There about there by forcing acceptance of the lighter brand. A safer brand was a feasible alternative design that would have had anything to do with Mr. Nunnally's

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cancers.

Go down to the third unnumbered subparagraph, that Reynolds was negligent for withholding information concerning carcinogens found in smoke from governmental and scientific communities.

That's a fraud on the government and fraud on the scientific community claim. The fraud claims in this case are gone. The final one, that Reynolds was negligent for maintaining the appearance of a controversy over whether cigarettes caused lung cancer when no such controversy, in fact, existed. Again, that's either a warning claim that we should have provided new and additional information to consumers, or it's a fraud claim. Both of those claims are gone so I would submit that what I now know is Plaintiffs P-3A, it should just be dismissed out of hand. There's no resemblance to the case we just tried. Again, we object to both of these on the ground you don't need a separate negligence instruction. Turning to P-3B, everything I said about what I thought was P-3A would apply.

JUDGE CARLSON: Yeah.

MR. ALDEN: And I think what I said was if you go to paragraph 2, what you have is this kind

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of free floating negligence claim, and you just can't have that in a product case. We're not dealing with a slip and fall here. We're dealing with a product. A product manufacturer's duties are defined by the product. And you have to have to have a negligent product case either a design defect, a manufacturing defect or a warning defect.

And they don't have a warning defect, they don't have a manufacturing defect, and the design defect is covered by the risk utility analysis as the Supreme Court said in "Hunter" that the strict liability design analysis is essentially a negligence analysis which it is. It's balancing the manufacturer's conduct and their design decisions and seeing essentially whether they're negligent. And that's why there is no difference in a design defect case between a negligence and a strict liability claim. And that's why you don't need two instructions.

JUDGE CARLSON: Mr. Merkel.

MR. MERKEL: Your Honor, the "Hunter" case das we've gone over before does not include maintaining product liability actions or strict

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liability actions. Both of these instructions are simply attempting in two different ways to give the

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jury guidance on how to decide a garden variety negligence case. Which is a company doing something under the same and similar circumstances a reasonable company would not have done or vice versa, failing to do something that a reasonable company would have done.

We have had days of testimony on this. Mr. Townsend was on the stand for three-and-a-half hours testifying about all the wonderfully reasonable things that his company had done. He wound up his testimony in response on to Mr. David's specific question, do you have an opinion as to whether your company has behaved in a reasonable and prudent manner in responding to the smoking and health issue by saying yes, he did. For the last 50 years, he thought they had done everything to reface or respond to that issue in a reasonable manner.

So to say that this issue is not in this case and hasn't been in this case is kind of just absurd to me. It's been in the case from the beginning. Now, the fact that some of the same factual acts could, absent Joe Nunnally's inability to say I relied on them. In other words, the only reason these counts were ever thrown out, Your Honor, is not because they were not tortious acts on

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the part of the Defendant, but because for the independent torts of misrepresentation and fraud.

We could not show that Joe Nunnally relied on some specific document or thing. So that's why we couldn't maintain those, because they have that requirement. There is no requirement in negligence that Joe Nunnally specifically rely on some particular piece or act. It is a free floating thing that if they are guilty of negligence and that negligence isn't reasonable -- reasonable progression leads to proximate cause of his injury, then they are responsible.

So we're not claiming fraud, we're not claiming misrepresentation, we're not claiming warnings. We're not going to have any instructions on any of those. But the fact that a tortious act on their part can give rise separately to warnings, to misrepresentation, to fraud, doesn't mean it can't give rise to negligence, Your Honor, in fact, it has to give rise to negligence. So we're not going on a specific count that's been ruled out by the Court. Haven't been trying to at all, but we are trying to show that a company, a reasonable company would not discover cholanthrene which is in this record in every way. They dug it up, they

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found another memo where they told it to some chemical group 10 years later. And that act is subject to review by the jury, if it's negligence to hold that back for 10 years from the arena of public knowledge, and governmental knowledge and scientific knowledge at that point in time, that's negligence, Your Honor.

Now, it could be something else, might

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have been if we had a fraud count, and if we get to punitive damages, it can certainly be something that can be urged for punitive damages. But at a bear minimum, it's negligence. It's a fact that's before the jury. It's been admitted that they found it in 1959, they made no report of it until 1969. Dr. Burns testified about that.

Then along came Townsend, and not only did he testify about that, but he tried to explain it away by saying well, we told him about it 10 years later, and in my opinion, it didn't make a bit of difference. He's told the jury that. I don't think it would have changed a thing if we'd told them in 1959.

So all of those things are issues, and we've provided two different alternatives. One that gives them specific instances of negligence that we

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think the facts will support. And the other is just simply if they marketed it by failing to do that which a prudent manufacturer would or doing that which a prudent manufacturer would not have done.

And negligence cases go to juries every week on bolt styles of that. And I'm not particularly -- that's why I put it in alternative forms. But we are entitled to go to the jury on a negligence issue, and these factual actions on the part of R. J. Reynolds are definitely for the jury to determine whether a reasonably prudent manufacturer should have done that or not done that in each instance.

MR. ALDEN: Your Honor, we've argued about this issue again, and again and again throughout this case. I'm sure we're boring you to death with it. Until today, Mr. Merkel's primary argument was that it goes to contributory negligence. Now that we're talking about their real claims, he realizes that contributory negligence isn't going to save him here. What he's telling you is they have a free floating negligence -- these are his words -- they do have a free floating negligence claim in a product case.

You can't have that. He never -- he

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never -- he talks about what Dr. Townsend said and how Dr. Townsend said we did responsible things in the design area, that we responsibly designed our product. That doesn't create a design claim for them. Then he goes on to say they have the cholanthrene nondisclosure, and that that creates some kind of negligence claim.

Well, if it creates a negligence claim, think about the kind of negligence claim that it would create. It would create a negligent warning claim. The only thing that could have happened if we had disclosed cholanthrene is that you would have warned the public more, or you would have warned the public differently. That's the only kind of negligence that we're talking about here. And the negligent warning claim is gone. It's preempted after 1969, and they don't have it before 1969 because it got dismissed on summary judgment.

Their negligence is nothing other than

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fraud, and he's right. It could relate to a fraud claim, but they don't have one. What we have here is one specific type of product claim. One of the three times that you can have, and that's a design claim, and the design claim is covered fully under "Hunter" by the risk utility analysis that you'd use

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for determining whether it's unreasonably dangerous. You simply can't have this notion of a free floating negligence claim. It has to be tied to a product defect. And all of them, all of the things he talked about could be tied to product defects. They could even be tied to a design claim. If he wants to dispute that Dr. Townsend testified that all our designs decisions were good, he can dispute that. That's part of the negligent design claim. That is what we are here about.

But if he wants to dispute what we should have disclosed, what we didn't tell the public, what we didn't tell the public, that is also subject to a negligence claim, but negligence of warning claim or negligent misrepresentation claim. Those we don't have. Those we didn't try. And maybe we attempted and with some success to try those claims, but those are not the claims that are left in the complaint, and those are not the claims that the Court hasn't dismissed.

JUDGE CARLSON: I knew we'd be coming to this point. I knew this would be the main -- one of the main contentions here. I'm satisfied with the record here, and what's before the Court and the jury that we can focus on the risk utility. And I'm

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going to deny 3-A and 3-B. I understand what the Plaintiff is saying, but I think that's what it boils down to. And I think basically the Plaintiffs will be able to pursue a viable claim through the risk utility and go at it from that standpoint. I'll deny 3-A and 3-B. What about P-4? Any objection to P-4?

MR. BELL: Your Honor, there are just three or four little things we'd like to add in one substantive objection. If we could insert the words after A, "All the damages of every kind sustained by the decedent as a result of his death, if any" --

JUDGE CARLSON: Where?

MR. BELL: Just before B, "his death if any".

JUDGE CARLSON: Factor 6, before paragraph B, "loss of enjoyment of life"?

MR. BELL: No, I'm sorry, Your Honor, up at the very first paragraph. There's an A and an B.

JUDGE CARLSON: So under A, all the damages if any.

MR. BELL: Yes, Your Honor.

MR. BELL: A and B?

MR. BELL: Yes, Your Honor.

JUDGE CARLSON: Is that the only?

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MR. BELL: "Any and all damages of any kind to any and all parties injured in the suit as a result of the death," there needs to be "resulting from the death."

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JUDGE CARLSON: In factor 6, what are you saying?
MR. BELL: Paragraph B, first paragraph, "All damages, if any, of every and kind, any and all parties interested in the suit," and we'd like to add the words "as a result of the death." And one minor change in the second paragraph, if we could add "any" after the word "damages," "in determining the amount of damages, if any."
JUDGE CARLSON: I'm trying to keep up. Where is that now?
MR. BELL: Second paragraph, unnumbered "in determining the amount of such damages, if any."
JUDGE CARLSON: Okay. That's pretty standard language, okay.
MR. BELL: And then, Your Honor, the only substantive objection we have to this instruction is paragraph 6, the -- the hedonic damages.
JUDGE CARLSON: Well, I routinely grant it. I know that some attorneys and some parties object, but I'll -- the objection will be noted, and

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that will be given.
MR. ULMER: Your Honor, on the hedonic damages part, the value that is perceived as the loss of enjoyment of life, as result of his death, as an alternative will the Court consider limiting up until the time of his death? I don't think you can get hedonic damages beyond -- during his period of illness up until the time of his death I think is the current law, but I could be mistaken. We would ask the Court to make that amendment.
JUDGE CARLSON: Insert "up to his death" as opposed to "a result of his death"?
MR. ULMER: Yes.
MR. MERKEL: Your Honor, that's not even the same element. That's conscious pain and suffering or whatever up until the time of his death. That's number 4. The other is the loss of enjoyment of life of a decedent for what his normal life would have been but for his death. I mean, that's --
JUDGE CARLSON: Well, I'll leave it as it's worded. One thing, let me find out from Mr. Bell, backing up to paragraph B, the first paragraph, you were asking that it read like paragraph A as far as adding the phrase "as a result

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of his death." Where are you proposing to insert that?
MR. BELL: Your Honor, I suggest paragraph B, "All damages, if any and every kind all parties interested in the suit as a result of death."
JUDGE CARLSON: P-4 will be given with those modifications. All right. D-1 will be denied.
MR. ULMER: D-2 is withdrawn.
JUDGE CARLSON: I think I have it. That's the one that was already announced earlier?
MR. ULMER: Yes, Your Honor.
JUDGE CARLSON: D-3.
MR. MERKEL: D-3, we object to it, Your

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Honor, it has no relevancy, whatsoever of any issue that's been in the lawsuit and certainly nothing that is in it now. The fact that the product might be legal doesn't give them any rights whatsoever other than they're not committing a criminal act. But the risk utility is still the same consideration under strict liability, and this would imply that somehow this gives them some sacred cow status, which they don't.

JUDGE CARLSON: Let me just say on a lot

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of these instructions, and my feelings have been through the years what I call kind of negative instructions to tell the jury what the case is not about. I think the lawyers can say that, and I think the lawyers can take an elements instruction and say here's what the case is about. And therefore, it's not about this, it's not about that. And that's what I read a lot of these instructions are saying like it's not about a failure to warn, it's not about misrepresentation.

Well, I mean, lawyers can take the elements instruction and say here's what the case is about, and not have all these negative instructions for the Court. I don't think -- that's the way I take D-3 as saying, you know, that it's a legal product. I mean, that's been known throughout. There's no allegation that Reynolds failed to include warnings. There's no allegation about this or that. I don't see where D-3 is going to help the jury resolve the case one way or the other, so I'll deny D-3.

MR. MERKEL: D-4, Your Honor, is exactly the same thing. We're again telling them there's no claim of this, no claim of that, and no claim of larceny. We object to that.

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MR. ULMER: Your Honor, if the case had not been tried in the manner in which it was tried by Plaintiff, a lot of these instructions would not be necessary. But Mr. -- well, not Mr. Merkel, the Plaintiff tried this case as if fraud, and misrepresentations and warnings were still a part of it, but that's the reason for this. In an ordinary case, we probably would not offer this. But the jury needs to know what you have excluded from the case.

JUDGE CARLSON: Again, I'll deny D-4. I think the lawyers can take the instructions that are given and tell them what the case is about and not about. So I'll deny D-4. What about D-7?

MR. MERKEL: We object to that, Your Honor. The P-2 has covered all of the elements under "Prestage" of strict product liability. This tries to separate out and make two separate things out of defective condition and unreasonably dangerous, not in accord with "Prestage", and so we object to it in its entirety just being a misstatement of the law after "Prestage."

MR. ALDEN: Your Honor, this really -- I think all that makes sense of this now is maybe the first paragraph. But really my argument would be

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the same for this instruction as well as for D-8. Both of which are an attempt to keep in what is still the law of Mississippi, namely that there are two requirements to recover on a products claim. And "Prestage" says that, Section 402A is still the law in Mississippi.

"Prestage" 617 Southern Second at 254, under 402A, "a product has to be in a defective position and unreasonably dangerous." "Prestage" goes on and says that risk utility defines unreasonably dangerous in a risk utility analysis a product is unreasonably dangerous in a person would conclude that the danger in fact whether it was it or not outweighed the risk utility of the product.

But defect didn't go away, and defect is still there, as late as '99, when the Supreme Court is talking about "Prestage". And I have now covered up the case, they say -- this is talk -- this the is the Supreme Court in '99 in "Pickering" which is 740 Southern 2nd, 836, they say "To prevail in a products liability case, the Plaintiff must prove not only a defect in the product, but also that the defect made the product unreasonably dangerous."

Defect didn't disappear with "Prestage." It wasn't a big focal point of "Prestage", but it

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didn't change the law. In fact, "Prestage" expressly said 402A is still the law. Under 402A, a product has to be two things. It has to be defective, and it has to be unreasonably dangerous. And defective means something, and it means that the product is, as we say in this instruction D-7, there's something wrong with the product, and it was not reasonably fit for its intended use.

We define it in more detail in D-8, and those are --

JUDGE CARLSON: You're asking for D-7 and D-8?

MR. ALDEN: Yeah.

MR. ULMER: Your Honor, if the Court would give D-7, we would withdraw D-8. And I think that D-7 is a -- is a plain statement of Mississippi law as Mr. Alden has already stated. And we want D-7 as submitted, because it contains defective condition and unreasonably dangerous, and if D-7 is given, we would withdraw D-8.

MR. MERKEL: Your Honor, under the risk utility test, analysis, if a product is unreasonably dangerous, it is defective. That's what unreasonably dangerous means. They're trying to create out of whole cloth some deal that we've got

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to show that some cigarette had a little defect of some sort in it other than the fact that it is simply unreasonably dangerous as it is manufactured. And that is not what any of these cases say.

The "Horton" case spoke to all of this, said the majority of the court concludes that the Court erred in failing to instruct the jury that the risk utility standard applies in determining liability. That's the standard for liability, not for one of these dual pronged things they're trying to make here of some separate defective.

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And the language of these cases does not say defective and unreasonably dangerous. It says defective, unreasonably dangerous in a flowing form. That's what "Prestage" says, and that's what "Horton" says on page -- another case, "O'Flynn and Hatten versus Owens-Corning Fiberglass," 1997 case, picks up the "Prestage" language, "One who sells any product in a defective condition unreasonably dangerous to the user."

And that is what -- you can have a defect, presumably, and if it did not make the product unreasonably dangerous, then you would not a case. We could have a paint blemish on the product or something of that nature. But if it is

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unreasonably dangerous, it is defective. That's what unreasonably dangerous is synonymous with. That's what "Prestage" said, and that's what instruction P-2 says.

And this thing is trying to create some new, dual standard that we've got to have some tangible defect in the product. And then we've got to also come in and show utility by risk utility test some unreasonably dangerous thing to it. And this product is, by virtue of what it is, based on the risk utility test, unreasonably dangerous, and that is the defect.

It's not that they make a particular cigarette like they wanted to make it. And it's not that one of the cigarettes broke or something of that sort. It is that made as they're made, containing the components that they contain and being used as they're intended to be used, their risk out ways the utility, hence they're unreasonably dangerous. And D-7 and D-8 are not in compliance with "Prestage" law.

JUDGE CARLSON: Why is it needed in light of what we know will be prepared a combination of P-2A and P-10? Why does the jury need to get told more?

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MR. ALDEN: Because they don't address the concept of defect. Mr. Merkel wants to reads "Prestage" as if it wrote out defective condition. It was a case that dealt with unreasonably dangerous. It said 402A, "402A is still the law in Mississippi. How the this Court defines the phrase is 'defective condition' and 'unreasonably dangerous' dictates whether a consumer's expectation analysis will prevail."

JUDGE CARLSON: What page of "Prestage" are you reading?

MR. ALDEN: 254, and they said again in -- do you want me to wait for you?

JUDGE CARLSON: Go ahead.

MR. ALDEN: They said again in '99 when they're in the Pickering case at 747 Southern 2nd, 846, and this is them citing their own "Prestage" case. "To prevail in a products liability case, the Plaintiff must prove not only a defect in the product, but also that the defect made the product unreasonably dangerous." If that doesn't tell you that these are two different elements and they can't

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just be mushed together, I don't know what does. Here's the Pickering case, Your Honor.

MR. MERKEL: Which is what I just said,

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Your Honor. We can't prove merely some little anomalous defect that doesn't make it dangerous or anything else. But the defect is the unreasonably dangerous. You can have all kinds of cosmetic defects or minor defects that affected the function of the product. It wasn't any good, there are better products to do the same job. But unless it's unreasonably dangerous, it's not a product case. If it is unreasonably dangerous, there is not a separate defect requirement. There is a requirement that whatever the defect is renders the product unreasonably dangerous.

Here the defect is that it contains tar which is a carcinogen which causes cancer. And that makes it unreasonably dangerous if the jury feels that the risk is outweighed by the -- or the risk outweighs the utility. All the other is, the section he just read is simply saying you can't have cosmetic or silly little defects and make a case. They have to render the product unreasonably dangerous.

JUDGE CARLSON: All right. From the record in this case and the instructions we've got, I'm going to deny D-7 and D-8. I'm doing that, Mr. Ulmer, I know you said you could withdraw D-8

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was given, but since D-7 was denied, I assume you want D-8 to be submitted and denied?

MR. ULMER: That's correct, Your Honor. Thank you.

JUDGE CARLSON: D-9.

MR. MERKEL: We'd object to that, Your Honor. That's been condemned by "Horton" and "Wilkes," and it's just -- that's clearly not the law in Mississippi.

MR. ALDEN: Your Honor, we think it is.

JUDGE CARLSON: I'll deny D-9, talking about good tobacco.

MR. MERKEL: D-10 has been incorporated already.

JUDGE CARLSON: D-11.

MR. MERKEL: D-11, again, Your Honor, we object to. This is ignoring "Prestage" and trying to go back to a consumer expectation test there in the middle. Consider whether cigarettes are dangerous to an extent beyond that which will be contemplated by the ordinary consumer and so on. To the extent any of that is relevant and is in the factors that have been give in P-2. This instruction is trying to go back to consumer expectation.

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MR. ALDEN: Your Honor, he's right, it is, but he's wrong about whether it's the law of Mississippi. We're relying expressly on the "Cooper" case which is a pre "Prestage" filed case, "Cooper v. GM" 702 Southern 2nd 428, and they expressly confirm for a common consumer product to be known as danger, the use of consumer expectations

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even after "Prestage." That's our point.
JUDGE CARLSON: I'll deny D-11 based on the instructions that are being given. D-12, isn't this something that can be argued to the jury by way of --
MR. MERKEL: It's asking the Court to comment on the evidence, is what it is doing, Your Honor. That's what it's doing. The factors are there, and they can argue whatever they want about it, certainly, but there's no authority for this kind of instruction.
MR. ALDEN: Your Honor, we think it's a fair comment on the evidence and one that's appropriate.
JUDGE CARLSON: I will deny D-12. I do feel like it's going too far for the Court to comment on the evidence. It can be argued to the jury, certainly using the risk utility factors.

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Okay.
MR. ULMER: This D-13 is an instruction, Your Honor, that we submit to the Court. But we understand that the Court has ruled to the contrary earlier in the case and in pretrial rulings.
JUDGE CARLSON: All right. D-13 will be denied. Any further comment on D-14?
MR. MERKEL: Yes, sir, we would object to that, Your Honor, totally un -- I mean, I don't even know what we're talking about here. What period of time or anything else. There were no warnings whatsoever ever given by anybody before 1966. After that, the only warnings ever given were not given by R. J. Reynolds but were given as a result of an act of Congress. So it's not only deceptive, but it's too vague to have any meaning.
MR. ALDEN: Your Honor, we don't have a problem with putting a time frame on this instruction, but we think it's very important that the jury not be allowed, and we think it's critical for preemption purposes, that the jury not be able to evaluate the adequacy of Congress's warnings that Congress has said is adequate and has barred states through their tort law from challenging it. And that's all this instruction seeks to prevent, to

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prevent the jury from making an assessment it's not allowed to make.
MR. MERKEL: That doesn't cure either of our objections, Your Honor.
JUDGE CARLSON: I'm not sure -- maybe I'm missing something as to what this is going to help the jury to do, or what it's going to help the jury to maybe not be misled -- not misled, but maybe apply the wrong standard or get off on a tangent. I'm not sure what this is going to do.
MR. ALDEN: Well, Your Honor, at least one of the risk utility factors that they're being asked to consider the extent to which consumers, in particularly, Joe Nunnally were aware of the risks of smoking. We have an adequate -- as a matter of law -- warning that was in effect from 1969 forward that bars the jury from making that assessment. What this instruction attempts to do is prevent the

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jury from making the assessment that they're absolutely barred from making by federal law.

It tells them as a matter of law, those Congressional warnings are adequate, which is what the statute says, which is what "Cippolone" effectively means. And if they're allowed to assess the adequacy of Congress's warnings, that is a

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preempted claim.

MR. MERKEL: Your Honor, it's --

JUDGE CARLSON: I'm going to deny the instruction. Again, I think it's with the elements the lawyers can explain to the jury what are or are not the issues.

MR. ULMER: Your Honor, could we resubmit D-14 just in a modified form, from and after 1969 and have the Court pass on that as well?

JUDGE CARLSON: Okay, that can be stated for the record that the Defendants would propose to modify D-14 and submit one putting a time frame on it. If that were done, it will also be denied for the record. D-16, is that --

MR. ULMER: 15 is withdrawn.

JUDGE CARLSON: All right, D-15 is withdrawn. D-16?

MR. MERKEL: Again, Your Honor, it's a comment on the evidence of some sort here. And issues that are obviously what Joe Nunnally had available to consider is going to be an element that the jury is going to have to judge based on their claim that he was comparatively negligent or assumed the risk or however they're going to say it.

So this instruction is again -- well,

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it's just not correct under this. This is how they got the other counts thrown out. But it doesn't have a thing to do with their affirmative burden to show that somehow he knew something about smoking which made his actions comparatively negligent or assuming the risk. They can't have it both ways.

MR. ALDEN: Your Honor, we think it's a fair comment on the evidence, and it's appropriate and one you should give the jury.

JUDGE CARLSON: Okay. I'll deny D-16. What's the next one, D-17?

MR. ULMER: D-17.

MR. MERKEL: Your Honor, they had a version of this at one time, I think, which more or less went to comparative negligence. This one does not. If they're going to still contend that they have a comparative negligence case, then there's a whole lot more instruction that needs to be on this. Their original one had another sentence, "If on the other hand his negligence was only a partial cause, then you should determine the percentage of fault allocable to Joe Nunnally." And of course, that's not fully fleshed out even there, but the way it is in this form is just -- it's totally inadequate as a comparative negligence instruction to the jury.

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MR. ULMER: Your Honor, Reynolds has two major defenses. One is that there was no defect in the cigarettes, and the cigarettes were not

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defective and unreasonably dangerous. The second is that Joe Nunnally assumed the risk of the injury under a negligence analysis. If he knew the danger, appreciated the danger and voluntarily exposed himself to the dangers, and that constitutes negligence in the eyes of the jury, and that was the sole proximate cause, then the verdict should be for us.

Now, what the Plaintiff is complaining about is that it should -- it should be more of a comparative instruction. If they want to give that, we don't object to that, Your Honor, but this is our instruction, and we're entitled to this base defense.

JUDGE CARLSON: I'm going to give D-17. All right. D-18?

MR. ULMER: Your Honor, I tell you what --

MR. MERKEL: I think that's already covered, Your Honor, by the Court's proximate cause.

MR. ULMER: Let's withdraw D-18, Your Honor.

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JUDGE CARLSON: Okay. D-19?

MR. MERKEL: Well, I think the "kind of" in the middle of the first sentence, Your Honor, is, I don't know, some kind of a comment on the evidence or something, I suppose. Take that out, and simply read "If you find from a preponderance of the evidence cancer from which Joe Nunnally died did not cause or substantially contributed to," then it's not objectionable.

MR. ULMER: That's fine, Your Honor.

JUDGE CARLSON: Take out the word "kind of," and put "evidence that from the cancer which;" is that right?

MR. ULMER: Yes.

JUDGE CARLSON: It will be given as modified, D-19.

MR. ULMER: D-20 is withdrawn.

JUDGE CARLSON: D-21 is just saying --

MR. MERKEL: Again, what it's not, Your Honor. We're not giving them any instruction on punitive damages. We're telling them what damages they can consider in great detail. And I think this is just -- the most likely effect of it is that the indication on the bottom of it that you will consider it whether or not awarded in another phase

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of this trial is probably included so they'll hope to go home and not have to spend anymore time down here.

MR. ULMER: The opposite danger of that, though, Your Honor, is they can they can give punitives in this phase. They've been voir dired on punitive damages, and Mr. Merkel has stated there will be a second phase in the presence of the jury. I don't think that's going to be a shock to the jury. But he's tried a company conduct case. And it would be misleading not to tell the jury that in this phase you cannot award punitive damages.

JUDGE CARLSON: The last sentence, I don't really have any problems with instruction, but

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is the last sentence needed?
MR. ULMER: No, Your Honor.
JUDGE CARLSON: I'll take out the last sentence and give it, then. By inserting the phrase "if any" on the damages, is there any need for D-22?
MR. ULMER: We'll withdraw D-22, Your Honor. D-23 is withdrawn.
JUDGE CARLSON: D-24 was an interrogatory. I guess that's at issue on whether the jury can go at it by way of decision making on general verdict or active interrogatory or what? Is

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D-24 still submitted?
MR. ULMER: It is submitted, Your Honor.
MR. MERKEL: It's a mess the way it is, Your Honor, because it has all of the language that's already been ruled out in their D-7 and D-8. So if we're going to do a special interrogatory, it needs to be drafted from scratch with regard to the instructions that have been given. But I don't see any particular reason to need a special interrogatory.
MR. ULMER: Your Honor, I think we can clean this up very simply. The jury should be required to determine whether or not the cigarettes are defective and unreasonably dangerous. They should be required to determine whether the defect and unreasonably dangerous condition caused or contributed to his cancer. They should determine whether or not he was negligent. And they should determine damages.
And I think the Supreme Court has indicated that in a case such as this that it's helpful to the Court to know how the jury went at the decision that it made. Now, I did note, Your Honor, that in the Court's charge that there is a -- C-2 is a verdict form. So we don't need both, and

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we submit that what we need is the special interrogatory to the jury.
MR. MERKEL: Again, I think our primary position, Your Honor, is this is wrong. If we're going to give them a different one we need to ask them if the utility of the product or risk of the product outweighs the utility, there by rendering it unreasonably dangerous.
And if they answer that yes, then did the unreasonably dangerous nature of the product contribute to his cancer and death. But again, from the Plaintiffs' standpoint, I just don't think, particularly with only one issue left, that there's only reason that a general verdict isn't adequate.
MR. ULMER: Your Honor, we could deal with number one by just letting it read, "Do you find from a preponderance of the evidence that the cigarettes designed and manufactured by Reynolds and smoked by Nunnally were" -- strike the words "both in a" "were a defective condition unreasonably dangerous as defined elsewhere in these instructions." That would satisfy the complaint. But the Plaintiff has got it all wrong, Your Honor. The risk utility analysis is an analysis to get to whether or not something is defective and

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unreasonably dangerous. It's not in place of defective and unreasonably dangerous. So we think the instruction as modified would be the appropriate one to submit to the jury.
JUDGE CARLSON: I think it would be better to submit it in interrogatory form, but let me see if we can work with what we've got. On the second line, "Joe Nunnally were," and pick up where? Take out the word "both"?
MR. ULMER: Take out the word "both."
JUDGE CARLSON: In a defective --
MR. MERKEL: Defective, unreasonably dangerous is the language of the cases.
MR. ULMER: It is not -- I mean, the language of the cases, he could find one that says that, I can find 40 that says it's defective and unreasonably dangerous. Or he may find three that says that, but if we could put defective and unreasonably dangerous, Your Honor, I don't see how that would harm anybody.
JUDGE CARLSON: What about "in a defective and unreasonably dangerous condition," is that what you're talking about?
MR. MERKEL: Yes, sir.
MR. ULMER: Defective and unreasonably
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dangerous condition.
JUDGE CARLSON: Let's do that. I might ask, it might be better, all of them for, make sure this is legible, that somebody can print out a modified version.
MR. BELL: We'll do that, Your Honor. We'll get those changed and printed out.
JUDGE CARLSON: Let's look -- also paragraph 2 that the defective and unreasonably dangerous condition or nature of the cigarettes --
MR. ALDEN: Condition.
JUDGE CARLSON: All right. Condition of the cigarettes? Is that right?
MR. BELL: Yes, Your Honor.
JUDGE CARLSON: I think that would take care of it. So basically, y'all combined P-2A and D-10 as previously discussed, and D-24, I think that takes care of it, doesn't it?
MR. ULMER: It does, Your Honor.
MR. MERKEL: Your Honor, we would have one more to offer going to the comparative negligence claim since theirs doesn't do any of that. We would just propose on 3608 out of the specific jury instruction group, it would have to be modified, of course, to show if you find that the
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Defendant -- Defendant's product was defective and unreasonably dangerous, and that the Plaintiff was negligent and that the fault of both Defendant and Plaintiff were proximate contributing causes for the accident in this case and so on.
JUDGE CARLSON: Okay. What about that? Comes out of the model jury instruction book?
MR. ULMER: If he wants to put that in, Your Honor, I don't have any objection to that.
MR. MERKEL: It's got to be modified a

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little bit. Because it starts out with negligence in both blocks. So it's going to have to be modified to show that the product -- if the Defendant was liable for a defective and unreasonably or defective -- for an unreasonably dangerous product, and the Plaintiff was negligent, and the negligence of both or the fault of both, I guess, would be the better way to say it. Would that --

MR. ULMER: I don't have any objection to the concept of the Plaintiff offering a comparative fault instruction. I would like to see it once it's typed.

JUDGE CARLSON: Let me suggest to you, again, from the standpoint of time frame, the jury

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coming back, if y'all could agree on it, just like on these other couple of instructions if y'all could agree on the wording hopefully before it's stricken out and admitting it. We don't have the jury sitting back there, we need to change this, spend another hour or so haggling over language.

MR. ULMER: I don't see how anybody could try to load this one up, Your Honor. That's my expectation, that he won't try to.

JUDGE CARLSON: Okay.

MR. ULMER: So I can't imagine that I would have any problem.

MR. MERKEL: This is the main problem I see. Is that fault there in place of negligence? Is that all right? Since one of them is going to say unreasonably dangerous product, and the other one is going to say negligent, and they are both forms of fault.

MR. ULMER: I think we can work that out, certainly.

JUDGE CARLSON: Let me back up, I saw two that I laid aside, D-5 and D-6. And at the outset, you said those would be agreed with some modifications. Are y'all working on the modifications?

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MR. BELL: Yes, Your Honor.

MR. MERKEL: Another housekeeping matter. I think you've got three or four exhibits floating around never been ruled in or out. The death certificate is one. There are two or three of those boards.

JUDGE CARLSON: I think the language, the cause of death on the death certificate needs to come out. Is the death certificate of any value after that, then it can be submitted with that redacted out. But I made a note of that, too, you know, with everything else in the record, I think the fact that it was inserted by the doctor or whoever did that, I'm satisfied that needs to come out.

After giving it some thought, again, it's no telling what kind of information he had at his finger tips to come to that conclusion. I just don't think that's necessary in the case, and I think the -- what were the others -- there were a couple -- I think there was an objection to

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Dr. Bennett and the treatises on those blowups and the slides, and there was an objection about those being treatises, and I think there was a definition of what that was?

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MR. ULMER: That's correct, Your Honor. It provided the characteristics out of a textbook for what he would expect to see for a particular cell type.

MR. MERKEL: And again, our objection to those, of course, is they are using learned treatises in a way that they can't be used. They can be relied on and commented on, but they're not admissible.

JUDGE CARLSON: What's the response to that? Ordinarily treatises don't come in. I don't know what the purpose of that was.

MR. ULMER: Your Honor, the -- on the board there are photomicrographs from Joe Nunnally that do apply to this case. And if you exclude the learned treatises, you exclude the photomicrographs. So we submit the Exhibits in toto.

MR. MERKEL: Your Honor, all you've got to do is take a pair of scissors and snip. They don't want to exclude anything. But what they're trying to do is take a piece of material from a book that has no independent evidentiary basis other than their particular expert said he relied on it, which he can do. But that doesn't give it independent evidentiary basis for introduction, and you know,

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that's what they're doing with it.

JUDGE CARLSON: I think the Exhibit -- I think it ought to come out in some form or fashion. I think it should be covered up in some shape and the rest of it come in. The rest of it would be fine.

MR. LISTON: We have a motion in limine to prefer exclude in matters during the closing argument that we'd like to bring up. This was filed, served on Your Honor, a copy given to Your Honor, yesterday. I have a copy here.

JUDGE CARLSON: Dr. Routt's deposition needs to be marked for ID purposes for the record.

(Exhibit 773 marked for identification.)

JUDGE CARLSON: Is this to be taken up now, Mr. Liston?

MR. LISTON: Yes, sir, before we start in closing statements and arguments.

JUDGE CARLSON: What I'd like to do is take a break and everybody kind of shift gears and work on these jury instructions, kind of regroup, get ready for argument. And when I come out, I don't think from looking at it, hopefully I don't think it will take that long, and we can deal with it before we put the jury in the box. So I'll step

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down at this point and give the lawyers time to hopefully do all of these things, rework instructions and get ready for closing arguments. And I don't know whether getting a bite to eat for the lawyers is out of the question or not. That's up to you I guess.

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MR. LISTON: We need to be back at 12:30, right?
JUDGE CARLSON: You need to be back at 12:30. The jury is coming back, and we need to be ready for them.
(Exhibits 199 and 200 entered into the record as amended.)
(Exhibit 773 marked for identification.)
(A lunch break was taken.)
JUDGE CARLSON: All right. I was getting the instructions in order. And the ones just submitted, prepared based on the jury instruction conference as modified, it appears everything is in order on the jury instructions. Does everybody agree on that?
MR. MERKEL: Your Honor, do you --
JUDGE CARLSON: I have the P-6, the comparative negligence.
MR. MERKEL: Have you got it?

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JUDGE CARLSON: Yes.
MR. DODSON: P-6A.
MR. MERKEL: We had to redo it after you got it, Your Honor, because their special interrogatory had been -- well, there was a possibility the way we had it of them first reducing it up hear and putting another figure on the special interrogatory. And we'd just leave the Court to finally determine the proper thing. They're shown on the special interrogatory procedure Mr. Nunnally's negligence. But the jury won't be making any multiplication, itself, as it would first do in the version of P-6 we gave you.
JUDGE CARLSON: You're submitting P-6A in lieu of P-6?
MR. MERKEL: Yes, Your Honor, because this was requiring the jury to make a calculation that under this version the Court would just do itself.
JUDGE CARLSON: Any objection to P-6A being submitted in lieu of P-6?
MR. ULMER: No, Your Honor.
JUDGE CARLSON: All right. Let it be marked. The only other thing I know is anything further regarding the motion in limine filed by the

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Defendant, submitted by the Defendant.
MR. LISTON: Were you going to take it up after you give the charge, or do you want to do that now?
JUDGE CARLSON: Better go ahead and do that now, because I anticipate going on into at least part of the closing argument. And let me find out maybe initially what the response is by the Plaintiff to the motion in limine on the closing argument.
MR. MERKEL: Your Honor, the response would be the same as it would be in any case. We don't intend to argue anything that hadn't been admitted by Your Honor into evidence. If it's been admitted into evidence, we will argue it in the appropriate context to the instructions of the Court and the issues that are before the Court.

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But if it's in evidence, it's in evidence, and we certainly will intend to make use of any part of what's in evidence for any issue that is pertinent to the remains in the lawsuit.

MR. LISTON: That's where we get into problems, Your Honor. The Court ruled initially an exclusion under our motions in limine about public statements by Reynolds. Reynolds' alleged failure

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to disclose information, and advertising perceived by underaged person. And Reynolds' study, analysis and understanding of underage smoking, a supposed conspiracy between the tobacco companies.

And then also if it's not in this motion, I'd like to add it. Yesterday, Mr. Merkel had injected what seemed to be a proposed alternative design consisting of nicotine free cigarettes. And all of these areas were specifically excluded, either by the Court's rulings on summary judgment or on motions in limine. Yet a lot of it came into evidence regardless of that through the Plaintiffs' case. And in fairness to -- to the Plaintiff, we don't want to be up objecting and interrupting his closing argument, and we think that -- that we need an order requiring them specifically not to refer to these excluded matters.

MR. MERKEL: Your Honor, if they're in evidence, we will refer to them. If they're not in evidence, we won't. You overruled their objection on numerous matters that they claimed were covered by some prior ruling. And the Court overruled their objection and allowed it into evidence. So if it's in evidence, it's in evidence.

And that's all I will refer to are things

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that are in evidence. But if they are there, and they pertain to an issue that's in this Court, if they want to contend that Mr. Nunnally at age eight or age 10 did something wrong, and it is in evidence that he did the exactly what they anticipated a person would do with their product, then that goes towards whether he was negligent or not.

Whether he was doing something that was foreseeable to them when they sold him their product. So I don't know what we're doing here. This whole thing has started six months ago with trying to exclude evidence out of context. And now at the trial, it's been put in context, some of it has come in to impeach testimony of Mr. Townsend. Some of it's come in to contradict other things, but I certainly don't intend to argue anything that Your Honor has not admitted into this record and overrule their objections as to.

MR. LISTON: That highlights the point there. And I wasn't involved in the instruction conference that you had with counsel, but I heard what I thought was a statement of the Court that we were going to get down to just what this case is about, and that's cigarette design. And that the negligence was not in it anymore.

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JUDGE CARLSON: What I routinely do, and the only way I know to go at it, the rulings were

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previously made on these issues. No doubt, pretrial, certain evidence during the course of the trial came in that perhaps the Defendant felt should, under no the circumstances, come in, but you can't deal with these things in a vacuum.

In a perfect world, I guess we could sit here for the rest of the day -- I'd sit here for the rest of the day and not deal with any objections, and let the lawyers have at it with the jury. But in the imperfect world that we have, and the imperfect system that we have, there may be objections, but I can't sit here and just put blinders on the lawyers.

I mean, the lawyers know what the rulings were, and there may be a continuation by way of objection or disagreement as to the ruling or what it goes to or does not go to. I think the best way to deal with it is to put the jury in the box, and go forward and just see what happens.

MR. LISTON: All right, sir. That's what we'll do. Thank you, Your Honor.

(Jury enters courtroom.)

JUDGE CARLSON: All right. Members of

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the jury, we are ready to go forward. I know we're a little past the allotted time, but all the lawyers worked hard to get us to this point by way of going through the jury instruction conference. And there were certain instructions that had to be modified and redone. And they all worked hard to get that done, and so we're ready to go forward.

Since you've had the extended recess, since about 9:30 or 9:40 this morning, I do need to find out, once again, if you've had occasion to talk to anybody about the case or any outside information gained about the case, anything you need to bring to my attention regarding any contact or discussion about the case or information received on the case?

There again, I take it by your silence, there's been no contact or discussion or information received. And so again, I'll mention to you the procedure. In a moment, I'll read the laws to you. As you know from my earlier comments, you will have the law in writing when you get back into the jury room. But I think at this point, you're at least hearing the law and having some general knowledge of the law that will aid you as you listen to the lawyers talk to you in their final remarks.

Members of the jury, you have heard all

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of the testimony received and the evidence introduced in the trial. The Court will instruct you as to the rules of law you can use to apply to this evidence in reaching your verdict.

Madam court reporter, I don't think we need to take this down unless there's a request.

MR. MERKEL: Not from the Plaintiff.

(Jury instructions read by the Court.)

JUDGE CARLSON: Ladies and gentlemen, those are the instructions. Again, you will have the benefit of these instructions of law in writing in the jury room. At some point, I believe I may have mentioned yesterday that the attorneys have

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been allotted up to an hour-and-a-half on each side, 90 minutes per side, so obviously you know I'm not going to keep you there in the jury box for three hours.

I'll try to keep up with the time you're there in the jury box, but if you need a break before I declare a break, no matter who's on the floor or who's stopping, just stop somebody in mid sentence and say wait a minute, I need a break, and we can take a break at any time. So at this point, we'll go forward, and I'll mention to you here under our procedure, since the Plaintiff has the burden of

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proof, the Plaintiff has the opportunity to both open and close with these final remarks with the Defendant coming in between. And how much time, Mr. Merkel, do you want on the front end?

MR. MERKEL: Your Honor, 45 minutes, and if I could have a warning at 40 minutes, please.

JUDGE CARLSON: 45, 45 and five minute warning as you approach the halfway point.

MR. MERKEL: Please.

JUDGE CARLSON: All right. Mr. Merkel.

CLOSING STATEMENT BY MR. MERKEL:

MR. MERKEL: Ladies and gentlemen, we have been at it diligently now for the better part of three weeks, I guess. And I know you're tired. I'm a pooped puppy myself, maybe a tired old dog, but we're on the home stretch. These are the last phases of a trial. And as I told you at the outset, we were going to bring you a case that would show that R. J. Reynolds, the Defendant, is the manufacturer and seller of the most deadly, dangerous product, consumer product, in America today. There is no question about that statement.

Cigarette smoking, at this point in time, I think has been proven beyond any argument or doubt. Reynolds can still play their games with it

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has not been scientifically proven, but I think scientifically and any other way we know, today, that cigarette smoking causes cancer. We know that 16 to 25 percent of the people who smoke cigarettes, two packs a day for 20 years or more, are going to incur lung cancer. We know that 40 percent of all smokers of that magnitude are going to die prematurely of some lung-related disease, some cancer-caused disease, heart condition, lung, emphysema, the gamut of them.

Now, cigarettes are uniquely dangerous for two reasons. Number one, they contain nicotine, which is a habituating or addicting agent. And that, I think, also, there is no question about today, though the Defendant would imply to you that there still is some question about it, and that it depends on what the definition is and whether that definition went into effect in 1964 or 1988 or whenever it is. But the properties of nicotine, there is no dispute or no question about. They have pharmacological properties. They effect the brain, central nervous system, cardiac effort, respiratory effort. They effect all of those functions, and they are habituating.

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Now, what does that mean? That means

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that we're combining a nicotine addiction with a product which, used over a long period of time, is going to predictably cause lung cancer and other diseases. And the habituating nature of the nicotine means it's going to be used over a long period of time. There's no question about that. Studies repeatedly have shown that. Reynolds' own internal documents show that they know that. This is not something unforeseeable. This is not something that they are not aware of. It's not something that is even subject to argument at this point in time.

Now, that combination of addictiveness and the carcinogen effect of the tar that's found in tobacco makes this product not only dangerous but lethal. Now, where does that put us in a lawsuit like we have today? This lawsuit is what's called a civil action, a tort action. And it's governed by rules of law, not criminal law, but civil law. And you recall both when we were voir diring each one of you or asking you questions on an individual basis in the little courtroom down the hall and back in this courtroom, you were asked repeatedly about your views and your thoughts coming into this case about where fault might lie, and where responsibility

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might lie and these types of things. But now you have heard the instructions of the Court and the law that is applicable to this case, and that's what governs here.

Now, let's put one thing aside right off the bat. Cigarettes are not illegal to be sold, but that fact does not get the Defendant one inch in this lawsuit. This is not a criminal trial. We are not here because they violated a criminal law. They have a right to sell the things, if they comply with the civil law and the sort law, and that's where you, as a jury, come into play.

Yes, as long as it's not illegal, Reynolds can sell whatever it wants to; however dangerous it might be and any of the other factors. But they are responsible, under the civil law, for the damage caused by that product. And the law that tells you that, that his Honor has read to you, is found in instruction P-2A/D10. It is the law of this case as far as liability.

It says, "You are instructed that under Mississippi law one who manufactures and sells a product in a defective condition or unreasonably dangerous to the user or consumer of the product, is liable for physical harm the product may cause to

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the user or consumer. If the seller was engaged in the business of selling such a product, and the product is expected to and does reach the user or consumer without substantial change in the condition in which it was sold."

There is no question, even Reynolds, with all of their questions, is not going to raise the fact that they made the Salem cigarette. They're not going to tell you that they reached the

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marketplace in some changed condition from when they made them. In other words, this is not a product that after it was manufactured and was shipped to the store, somebody at the store stepped on it and broke it, and that caused it to become defective when it hadn't already been.

The instruction goes on, "in applying a risk utility analysis," and that is the analysis that is used to determine whether a product is unreasonably dangerous -- "in applying a risk utility analysis, a product is unreasonably dangerous if a reasonable person would conclude that the danger, in fact, whether foreseeable or not, outweighs the utility of the product."

Now, what "foreseeable or not" means is that even if the Plaintiff appreciates the danger of

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a product, he can still recover from the Defendant, provided that the utility of that product is outweighed by its danger. There are two factors in this case that are completely separate. They have to be considered completely separate.

On the one hand, did this Defendant make a product which was unreasonably dangerous under the tests and the law as you've been given, and that does not have a particle to do with Joe Nunnally and what he did or didn't do.

Now, the Defendant has raised another issue on which they have the burden of proof. They're going to tell you that Joe Nunnally was negligent for doing what they wanted him to do and expected him to do. And that's the issue that you have been instructed on. And you can find Joe Nunnally was negligent if you want, based on the Court's instructions of what negligence is, but that one's over here. That's fault for negligence.

This one is fault for make a product which is unreasonably dangerous and selling that unreasonably dangerous product. And you can find both of those factors exist. That does not impair Joe Nunnally's family's entitlement to a verdict. And this is the family of Joe Nunnally that is the

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Plaintiff in this lawsuit today. And the Court has told you how you then use those two things to determine the relative fault of each of these parties that led to the fatal events that we're in Court about.

The law goes on, and the Court has instructed you, "In balancing a product's utility against the risk of injury it creates, you may consider the following factors. Number one, the usefulness and desirability of a product, its utility to Mr. Nunnally and to the public as a whole; number two, the safety aspects of the product, the likelihood that it will cause injury and the probable seriousness of the injury; three, the availability of a substitute product which would meet the same noticed and not be as unsafe; four, the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; five, Mr. Nunnally's ability to avoid

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danger by the exercise of care in the use of the product" -- in the use of the product.

Not by avoiding the product, but by exercising care in the use of the product. And I emphasize that because this is probably the only

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product I can think of that for a manufacturer to claim some user has been negligent in its use is going to be used exactly the only way it can be intended. If you buy a piece of machinery, you buy a lawn mower, you by an appliance, you work at a factory, and you're operating machinery, there may be warnings on it telling you how to safely operate it, telling you what not to do, don't put your hand here, don't climb on this, don't open the door while the motor is running, all kinds of warnings. And if you violate those warnings and get into the machine and get hurt, you were not using that product as it was intended to be used. You were not using it as you were warned not to use it.

A cigarette has only one possible function. They sell it because they want you to use it. They advertise to get you to use it. They seek users of their product. And if you use a cigarette as they want you to use it, it can kill you four out of 10 times. Now, that's why cigarettes are in a world all of their own. There is no way on earth to safely use a cigarette. There's no instruction limiting the amount. This isn't something you can abuse.

You can abuse alcohol. You can have one

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drink at night and probably not be affected, or you can go drink a whole bottle of something, get drunk and hurt yourself. But there's no such parallel with a cigarette, one pack, two pack, three pack, nobody says how many to smoke. They're out there to be smoked. Nobody says don't try them, because they'll addict you. That's part of the whole plan. That's what the internal documents show. They know that once a person begins using them, four cigarettes, the England article, the British Journal of Addiction cited after four cigarettes a beginning user is probably doomed to a 40-year addictive period of smoking cigarettes.

So if you smoke and if you continue to smoke for 40 years, you have done exactly what these things are sold to you to do. You have done exactly what they planned on you doing. You've done exactly what they advertise to lure you into doing.

MR. LISTON: Please the Court, we object to his statement about advertising.

JUDGE CARLSON: On that particular statement, I'll overrule the objection.

MR. MERKEL: The advertisements are in evidence, ladies and gentlemen. You can look at them again. I know you've looked at them. But what

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on earth does a manufacturer put this kind of material out for with beautiful, happy, smiling people having a good time smoking cigarettes except to the imply to anyone who reads this, this is the thing to do. "Welcome to the wonderful world of

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Salem." "The wonderful world of Salem. It's springtime fresh." "Step into the wonderful world of Salem."

What do they want you to do? They want you to smoke. And when you do, at whatever age it is, after a very few cigarettes, then the incentive given psychologically by advertising and by a person's basic needs, needs that are understood. These are needs that everyone understands people begin to smoke for. It's been studied for years. Reynolds studied it internally. Dr. Russell studied it in England. It's been studied all over the place.

And the reason people smoke is not for any need they know anything about. We have no craving for nicotine when we come into this world. And we have no craving to blow smoke into our lungs when we come into this world. But because of a psychological perception that it's cool, it's adult, it's manly, it's neat, it gets the girl, it gets the

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boy, whatever the ad implies, for all these reasons. What Dr. Teague, if you'll remember his memo called totally irrational reasons that people are induced to begin to try it for the first time. People begin to smoke.

Is Joe Nunnally negligent in doing that? That's for you to decide. What does negligence mean? The Court's told you it means doing something that a reasonable person would not do or not doing something a reasonable person would do.

How many hundreds of millions of people smoke? Are they all unreasonable? Are they all crazy? Again, I can't answer that. That's one of your considerations, though. But I know that as between this manufacturer on the one hand and Joe Nunnally on the other, I know he didn't do anything unanticipated. He didn't misuse their product. He didn't use it in a way they didn't expect. He reacted exactly as they had predicted and wanted him to do.

He began smoking at a young, impressionable age, eight years, because of big brother swiped some from mama and let him have them. And over whatever period, that habit grew to by the time he got to college, he was a two to

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three-pack-a-day smoker. Which, again, is exactly in accordance with what the company knows and predicts. It's not unforeseeable, it's not negligence. It's not doing something that a reasonable person wouldn't do. If reasonable persons would never smoke, then there's no reason for this industry to be here at all.

If everybody does as Reynolds now says Joe Nunnally should have done, they wouldn't sell another cigarette this decade, this century, if that's the test of being unreasonable. Is it fair to say to somebody this is cool, this is neat, this is going to be good for you, this is wonderful. The wonderful world of Salem, come and try it. And then come in Court and say well, he's just unreasonable, wasn't reasonable. He's negligent. It's all his

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fault. Don't look at us. I don't think that's fair. I don't think it makes any kind of sense from a logical standpoint.

But going on to the rest of the criteria that's set up. We were on Mr. Nunnally's ability to avoid danger by the exercise of care and the use of the product. The next one is Mr. Nunnally's anticipated awareness of the dangers inherent in the product and their avoidability because of general

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public knowledge of the obvious condition of the product or of the existence of suitable warnings or instructions. And, finally, the feasibility on the part of the manufacturer of spreading the loss by setting the price of the product.

In other words, there are choices, as I told you in opening statement, everybody has choices here. It's a legal product, it hasn't been outlawed, it's not illegal. There are responsibilities that go with selling any product. Those are as much a part of the law as the law that says it's not illegal to sell it. They know what they are. So they can make a choice. They can decide whether they want to sell this knowingly dangerous product, let the chips fall where they may, and be responsible for the people they kill or hurt with the product. And all they've got to do is just raise the price, build it into it, and that's what product liability law is based on.

It's better, for the manufacturer, who has all the knowledge, all of the wherewith to make the decisions, can price his product at whatever he wants to price it at, and can elect to change it, alter it, improve it, remove it from the -- from the product line or whatever. Let him, with the power

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to do all of this, bear the responsibility for people that are hurt rather than the widows and orphans of the people that are hurt. It's simply a matter of spreading the risk over all of the people who smoke and don't die to compensate those that do.

That's the rationale of the law. And there's nothing wrong with that. That's just as valid a rationale as it is to say we'll still let them sell cigarettes but not outlaw them. The laws go hand in hand. Yes, they have the freedom still to sell the cigarettes, but with any freedom goes the responsibility to be responsible for what happens with the cigarettes, and that's what this lawsuit's about.

We're here saying R. J. Reynolds needs to be responsible for what it's doing. It's not a happenstance thing. It doesn't surprise anybody. Look at the -- look at the history of this product, what's been known about it. 1953, Wynder shaved the mice and painted tar on their back sides, and they developed tumors. That information hit America, hit the scientific community. It was frightening. It was disturbing. Up until then, it could be argued as to who knew what, or how much anybody knew in the tobacco industry or anywhere else about the

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dangerous nature of the product. But that's been 47

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years ago.
We followed that with epidemiological studies, prospective the and retrospective studies that clearly associated smoking with lung cancer. Now, that's the environment that smokers are looking at when they make their choices that R. J. Reynolds wants to talk about. When Joe Nunnally made his choice in 1960, what was the state of the knowledge out there in the public arena? Well, we had the mouse study, we had the retrospective studies. What we also had them in 1954, as Mr. Townsend told you, saying, "Our products are not hazardous to health in any way."
So we've got a mixed bag floating around in the community. You've got pros and cons. You've got a side that's against it, says it's dangerous, you've got a side that says no, it hasn't been proven. That's not so. This is junk science. These are animal studies, not human studies. Epidemiological studies, those aren't real. That's just statistics. That doesn't prove anything.
So Joe Nunnally and his big brother were in that situation. Because from 1954 to 1966, nothing changed out there in the world of public

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knowledge except charges and counter charges. Tests that showed it caused cancer, statements that it didn't. It was not scientifically proven. In 1964, if you'll recall, the Surgeon General, finally spurred on by this apparent controversy, this public health debate about how dangerous cigarettes really were, did they really cause cancer.
At that point, the Surgeon General appointed a select committee of scientists, about 13 months earlier, gave the tobacco industry veto power over the entire committee. They could have thrown anybody off they wanted. And that committee, after 13 months of studying all the studies, all of the works, all of the literature, concluded cigarettes caused cancer in males.
Now, at that point in time, that should have been the end of it, but still you can find in the literature after that, as you've heard, denials that it's scientifically proven.
MR. LISTON: Objection, Your Honor.
JUDGE CARLSON: Excuse me.
MR. LISTON: Object. That's been excluded.
JUDGE CARLSON: On that particular statement, I'll sustain the objection.

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MR. MERKEL: Joe Nunnally has --
MR. LISTON: Excuse me, Charlie. May we just have a continuing objection, so I won't have to get up and interrupt him.
JUDGE CARLSON: Yes, sir, based on that, yes, sir.
MR. MERKEL: Joe Nunnally, in 1966 is 14 years of age. He's been smoking for six years. What do we know? What else is the Defendant saying about Joe Nunnally? Well, they're saying well, even if he got hooked when he was too young to know any better, and maybe y'all shouldn't find him too bad

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about that, well, he should have quit. Well, what do we know about quitting cigarette smoking? We know 95 percent of all of the efforts to quit are for nothing. It doesn't mean that only five percent of people have ever quit. But it means on each individual attempt that someone makes to quit smoking 95 percent of those are going to be failures. They're not going to make it.

What else do we know about it? We know that before age 60 only 30 odd percent of people are ever successful in quitting. And the Defendant brought in for you an expert, he was a psychiatrist, you recall, Dr. Seiden. And he told us that the

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reason people have trouble quitting is partly because of the nicotine and partly because of the craving. But he thought a big factor in it was their motivation to quit. Well, what causes motivation? Dr. Seiden said motivation comes from recognizing, personally, a particular risk and the immediacy of the particular risk.

You get up in the morning, you need nicotine. You want a quick hit that will get to your brain in 10 seconds from lighting it up. And on the other side of the decision-making process, well, somebody says in 1966 cigarettes may, may be hazardous to your health. When? How many of you? Who? Does it pertain to me? Does it not pertain to me? That's motivation.

Without knowing how personally it pertains to someone, when it's going to pertain to them and do I still have 50 or 60 years to do something about it? There is no motivation. There is no immediacy to making a decision. So Joe Nunnally continued to smoke, just as their expert, Dr. Seiden, predicted he would.

Young people feel like they're immortal. No young people -- person thinks about death, or illness or sickness. That's to somebody else,

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doesn't apply to me. So he continues smoking. 1970, we changed the label. Now, it doesn't say "may be," it says "is." "Cigarette smoking is dangerous to your health." But again, who says it? Congress says put it on there. And it says the Surgeon General feels, whoever that is.

All right. That one lasts for 15 years without any new changes in it, without any information as to what is dangerous, what is hazardous.

MR. LISTON: May it please the Court, that's been excluded under the preemption. He's talking about the sufficiency of a warning on a pack of cigarettes.

MR. MERKEL: I'm talking about Joe Nunnally's reaction as they're calling him negligent for doing, Your Honor.

JUDGE CARLSON: I think based on the evidence, I'll overrule the objection.

MR. MERKEL: This is the context which Mr. Nunnally's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious

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conditions of the product or of the existence of suitable warnings or instructions. How the

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individual is going to be expected to react based on the knowledge and the information that's there and based on the addictiveness of the product.

That's the Joe Nunnally story, and I'm not here to defend Joe Nunnally. I know any one of us, if we had an eight-year-old child that we caught smoking would wear him out. I would hope we all would, and Joe Nunnally, if he'd have been caught I think would have been worn out, too. But he wasn't, and with those first four cigarettes, he went to smoking.

Now, what does smoking do, aside from addicting you, how does it work? Well, I don't think there's any question about that. All of the experts that you've heard in this case have told you how it works. Over a long period of time, it takes the cilia out of the lungs, out of the bronchial area, changes the cell structure. And over a while, finally one of these cells runs amuck and becomes a cancer. It takes time, takes lots of tar plastered on top of them, and that goes on over a period. I don't think there's any question about that. And I don't think there's seriously any question in this case that Joe Nunnally got lung cancer from smoking Salem cigarettes.

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Now, R. J. Reynolds has spent, by my calculation, something like $70,000 bringing you expert witnesses in here to tell you forget what the hospital doctors said. Forget what the treating physicians said. Forget what people who were trying to save his life said in the medical records when they had no ax to grind, no motive for saying anything except what they honestly in their hearts believed was his problem. But ignore all those people, trust us. We came from New Orleans and Billings, Montana and Shreveport, Louisiana and wherever.

Now, why do these guys do that? Why do they consistently show up, I wonder? Well, Billings, Montana, this was his fourth testimony. He had looked at several others. The guy down in the New Orleans, Dr. Lang, I think it was his fourth or fifth. Dr. Bennett, yesterday, I think he had had six or eight of them. Of course, Townsend, 14 times, he's put on his show before juries.

This is nothing except a pat defense that comes out every time this happens in exactly the same way. First, cigarettes hadn't been proven that they're going to cause cancer. They're not addictive, that hadn't been proven. You didn't die

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from what you say or what your doctors say you died of. You had something else that came from somewhere else that wasn't lung cancer. Every step of the way deny, deny, deny.

But let's look at the medical records, and let's put some common sense to what the medical records said. They want to take the first day's impression, Dr. Routt, for instance, whose

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deposition you heard this morning, and Dr. Routt put "Large upper lobe mass does not have the typical appearance of presentation of bronchogenic carcinoma and the possibility of a sarcomatous lesion is to be considered." That's what he's supposed to do. He told you. All we do is speculate. We look at the x-rays. We try to consider the things that it might be, and we try to give some guidance to the pathologists. Because those are guys the who make the decision and decide what it is.

Well, you also had this impression on there from the first day by Dr. Blythe that it was probably a sarcomatous lesion, but because of the history of smoking, the bronchogenic carcinoma was still a consideration. Okay. Nothing wrong with that. That's a differential diagnosis. They do that everyday. You come in with a headache, they

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make a differential diagnosis. You could have a headache or a brain tumor at that time. But then they do tests. And the pathologists did tests, and what did they say? Bronchogenic carcinoma, squamous cell bronchogenic carcinoma caused by cancer, the type that is.

And what did they do? Did they believe that, or was this just something off the cuff? No, they believed it because that's what they treated the man for. They didn't give him chemotherapy which you would give for a sarcoma. They gave him radiation therapy to shrink the nodule at that point. And why did they want to shrink it so that then they could resect it, cut it out. And you don't do that if you think it came from somewhere else. You don't resect if it's a metastatic form of cancer. You only do it if it's a primary.

Did they believe it was a primary? He went to Houston, Texas, and had the lung resected. They put their -- they put his life where their mouth was. The witnesses that you've heard for the last two days this week, for the price of $25,000 for one of them and 17 for another and all the fancy boards and exhibits have told you well, in my opinion, it looks like something else. I just don't

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believe it is that. I don't care what they say, I'm here now defending R. J. Reynolds, and I think it looks like a sarcoma.

Well, that's not what it was. You've got Dr. Routt, you've got Dr. Fidler, you've got Dr. Alpert, all of them telling you that they made their best medical judgments. Treated it in the best way they knew how, and none of them considered it to be a sarcoma after the first day. Once the pathology was done, that was the end of sarcoma. And for the next eight or nine months of his life, he was treated for bronchogenic carcinoma.

Now, they've asked you or showed you through some of their experts that, well, Dr. Alpert didn't say squamous cell. She said nonsmall cell which clearly yesterday afternoon, Dr. Bennett, and I guess my DeMiaggio example was maybe a poor one. But there's nothing inconsistent about what Dr. Alpert said and what Dr. Fidler said. Squamous

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cell is a form of nonsmall cell carcinoma. She simply used another term to name the same thing. She put it in the terms that they use for diagnosis and treatment purposes. If it's small cell, you do chemotherapy. If it's nonsmall cell, you do radiation or resection. If it's squamous cell, you

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do chemotherapy. They didn't do chemotherapy.

There was no question among any of the treating physicians. Who are you going to believe? I would submit a treating physician who's on the line trying to save a patient's life has a whole lot more credibility than a hired gun traveling halfway across the country or further to appear in defense of somebody in a lawsuit. But that's ultimately your decision. But I think and I think you think he had bronchogenic squamous cell carcinoma, and he died in September of 1989.

Now, what are the damages arising out of that? Well, that's pretty obvious, but putting a number on them or evaluating them is a lot harder. In the first place, you had a 36-year-old young man who lived about nine months after being diagnosed. If you can put some perspective on it, here's a man with four children between the ages of three and 10 with a wife who knows the writing is on the wall. Nobody really gave him any real hope of being cured. So he has nine months of personal pain and agony, but nine months of probably worse mental anguish worrying about where his family is going to be three years from that date. How they're going to be taken care of, and what's going to happen to them.

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That's what mental anguish is, pain and suffering, yes, he had that, but I would submit and think that probably the mental anguish and the worry about the loved ones that were going to be there when he was gone were probably as bad or worse.

You've got his loss of enjoyment of life, you read the jury instruction on damages, you'll see it breaks it into two different segments, the losses to Joe Nunnally or the damages to Joe Nunnally, pain, suffering, mental anguish, and his loss of enjoyment of the remaining 40 years of his life expectancy. That's separate and apart from the other. How much is it worth to have 40 years cut off of your life? There's no way to put numbers on those kinds of things. There just isn't.

If you went to the marketplace and said, "I'll sell you a year for whatever," that would be ridiculous. You couldn't put a figure on it. But that's what, under our system, a jury has to try to do somehow. You can compensate or you can make whole for the loss of his wages. You can make whole for the reimbursement of his medical expenses. Those are easy. Lost wages range from $930,000 to $1,150,000 depending on whether you want to believe Joe Nunnally would have worked until age 65.

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If the economist said he worked only to age 60, which is the work life expectancy on some table, he'd earn $935,000, or that's the present value of what it would take to replace his future

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earnings. But if he worked all the way out to 65, the price would be $1,150,000, and that's simply up to you as jurors to decide. You may think he would have quit at 60. You may think based on what you've heard about his work ethic, and how much he worked and how hard he tried, that he'd have worked until 65. But that one's easy.

And he's got 30,000, 35,000 of medical, funeral, whatever kinds of bills. So we've got somewhere between a million, million two of hard cold damage to Joe Nunnally. But what do you add to that for the last of 40 years from his life? And that one is uniquely in your hands.

One, you're simply replacing, just dollars, dollar for dollar. The other is compensation for a loss that we don't really have any basis for how to judge it. We don't sell that kind of commodity. Then you've got the family, and their losses are totally different. You've got Kay Nunnally who lost her husband in her 30s, left her with four small children with no means of support

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other than what she could get out and do the in some fashion or other, and she has.

She's worked two jobs, she's worked three jobs, she's sent up to now three of those children into college. You heard the children. I don't think they've been deprived of -- of physical needs or -- they can keep up with their contemporaries. They haven't been embarrassed by their plight, but their mother has born a heavy load to do that for them alone.

JUDGE CARLSON: You're about five minutes from the halfway point.

MR. MERKEL: So Kay Nunnally's loss is big. Kay Nunnally has no social life. She's not remarried. This is 12 years ago. She doesn't go out. Her life has been in making those children their way in the world. Providing for them, encouraging them, going to their soccer games, seeing that they played enough that they got scholarships in college. All of these things are her losses, the loss of a mate. And I don't know how, again, one puts an accurate figure on that. It would be very difficult. And then we have four children.

Three of them who, to varying degrees,

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had relationships that they still remember with their father. One of them was so young that it does not even recall who her father was. But these children have -- they've had to work. They've had chores, they've had jobs. They've had to help their mother shoulder the load. Probably made them better children. Probably more responsible, probably a whole lot more mature and adult than a lot of children at their age. But they shouldn't have had to do that. They should have had a father going to their games and their sporting events with them. Somebody to come home and talk to when things weren't going well at school, particularly the boys, but they don't.

There is no mathematical way that I can

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tell you this is how these kinds of damages should be awarded. Our jury system does the that. But the instruction that you'll have, and I think it's instruction P-4, tells you all of the various elements that you should continue -- make sure that your calculation contains.

Just for round figures, I would think that Joe Nunnally's and Kay Nunnally's figures for the loss of his life and for her loss of a mate ought to at least equal the amount of his lifetime

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earnings that are just the cold, hard eight-hour-a-day proceeds of work. Because work is probably the thing that most of us do in order to enjoy the other hours. To spend the other time with our families, our friends, our loved ones in a pleasant setting in a good way.

We work because we have to work. The rest of our life is what really makes it worthwhile in most instances. So I'm suggesting, and that's all it is. Mr. Ulmer may give you some figure that he feels is a whole lot fairer. That's his prerogative. But I'm suggesting a million dollars for Joe Nunnally's losses, a million dollars for Kay Nunnally's losses, and a million dollars for the loss of his income that we know is a blackboard-type figure.

For the four children, they're going to reach maturity. They would not have had his constant companionship and his guidance after they reached the age of majority, and that's what the Court's instruction tells you. But they're entitled to -- they were entitled to that up until they reached majority. The younger one would have had it longer than the others. So you could divide that any way you want, but to me, I think another million

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dollars spread over those four children in some fashion would be a minimum type amount.

Those are simply my figures, my ideas. Yours are what count. I'm going to sit down now at this point. Mr. Ulmer will talk to you, and he'll tell you why there wasn't anything wrong with this product. Why it wasn't unreasonably dangerous. He'll tell you why it's all Joe Nunnally's fault. But listen to him and remember what the points I've made. See if his presentation really answers any of those points. See if anything he can say really relieves them of liability for their acts, for their actions in selling that product like they sold it. I don't think it will.

JUDGE CARLSON: All right. Ladies and gentlemen, you've been in place an hour and 10 minutes. Let's take a short break before we go forward.

(A short break was taken.)

MR. DAVID: Your Honor, I'm just going to take about 15 or 20 minutes and turn it over to Mr. Ulmer. I've asked your clerk to give me a 15-minute warning.

JUDGE CARLSON: 15 minutes into the talk?

MR. DAVID: Yes, Your Honor.

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JUDGE CARLSON: I'll let you know.
MR. ULMER: And can you give me a 10-minute warning at the end of mine?
JUDGE CARLSON: You want a 10-minute warning?
MR. ULMER: At the tail end.
JUDGE CARLSON: Okay.
(Jury enters courtroom.)
JUDGE CARLSON: All right. Ladies and gentlemen, ready to go forward now. You'll here from the Defendant, and I understand Mr. David would like notification after you've been talking for 15 minutes.
MR. DAVID: Yes, Your Honor. May it please the Court.
JUDGE CARLSON: Yes.
CLOSING STATEMENT BY MR. DAVID:
MR. DAVID: Members of the jury, my remarks will be brief, and then I will turn over my -- turn it over to my colleague, Mr. Ulmer, to complete the remarks. 47 years ago in 1953 Dr. Ernst Wynder published the results of his mouse skin painting test. And the medical and scientific community began to express concerns about smoking and health.

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We were in a far less technicologically sophisticated world at that time. Not every house had a TV. There were no touch tone phones, we hadn't sent the man to the moon, and rock and roll hadn't been invented. It was no different in the world of cigarette design. There were no filters for cigarettes, no reconstituted or expanded tobacco. No air dilution techniques employed in conjunction with filters and porous tobacco paper. No low or ultra low tar techniques employed in conjunction with cigarettes. No low or ultra low tar nicotine products, no Premier, no Eclipse, and only 90 of the almost 5,000 constituents in cigarette smoke had been identified.
The technology of cigarette design was very basic, unsophisticated, and you might say crude by comparison to what it is today. It is against this backdrop rather than with the benefit of 20/20 hindsight that you must decide the whether Reynolds acted reasonably in its design efforts. An alleged design defect is all this case is about.
Back then in 1953 or 1954, Reynolds had a decision to make. It could just sit back, do nothing, and keep selling its cigarettes as they were. Or it could launch an unprecedented effort

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over the next 47 years in terms of time, talent and financial investment to be responsive in its cigarette design efforts to the concerns regarding risks of smoking being expressed at that time by the medical, scientific and public health communities.
It had that choice to make. It chose to launch that effort, and since that time, Reynolds is proud to say that it has been a success in that effort, and that no one, no other tobacco company, not the government, not its critics, have done more than Reynolds to design cigarettes that reduce the

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risks of smoking.
From the beginning of this effort, Reynolds has taken seriously every theory expressed by the medical, scientific and public health communities as to what might be the culprit constituents in cigarette smoke. In its design efforts, it has operated under the premise that cigarette smoking does cause lung cancer, and it has sought in every case to reduce or to eliminate those compounds thought to be the problem.
The goals, then, were simple to state. Identify and remove problem constituents in cigarette smoke and reduce tar and nicotine. And you will recall that Dr. Wynder said that a

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reduction of 40 percent of tar and nicotine would be a significant reduction in terms of reducing the risks of smoking. Even Dr. Burns agreed that the reduction of the amount of tar was a desirable goal. He also admitted that if a smoker smoked filtered cigarettes or lower tar cigarettes without increasing the number smoked that a smoker would decrease the health risks of smoking.
But while the goals were simple enough to state, they were by no means easy to achieve. You all heard Dr. Townsend testify. He is R. J. Reynolds. He is a Ph.D. chemist with 23 years of cigarette design experience, a cigarette design expert. He told you about the complexities of cigarette design, of cigarette smoke chemistry, and Dr. Townsend told you something about Reynolds' investment in order to achieve these goals.
As many as 400 at a time, 700 scientists, billions of dollars, hundreds of thousands of hours, 47 years of regular and consistent experimentation, and technological inventions and invasions. Plaintiff hasn't refuted that testimony, nor has Plaintiff offered any proof that the goals or the efforts should not have been undertaken, or that it was unreasonable for Reynolds to undertake these

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goals. And that is one of the key questions that you must answer, ladies and gentlemen of the jury, were Reynolds' actions reasonable under the circumstances as they existed at the time when they were taken.
MR. MERKEL: Excuse me, Mr. David. I don't know what Reynolds' actions being reasonable under the present state of the case has to do with anything, Your Honor? Or if it does, then I can respond to it, of course.
JUDGE CARLSON: At this point, I'll overrule the objection.
MR. DAVID: One of the key questions that you must answer, ladies and gentlemen of the jury, were Reynolds' actions reasonable under the circumstances as they existed at the time when taken not with 20/20 hindsight of today. I submit to you that not only were they reasonable, but there is evidence that they should not -- there is no evidence they should not have been undertaken. And importantly, there is no evidence Reynolds didn't do its very best to achieve these goals.

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Just to recap what Reynolds did. As a starter, it undertook an effort to identify the constituents in smoke from the 90 in 1950 to more

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than 5,000 identified today, more than half of those identified and published by Reynolds. No one came into this Court to tell you those efforts were unreasonable. No one came into this Court to tell you that Reynolds should not have done that. Simultaneously, Reynolds undertook selective reduction efforts to remove or prevent the formation of constituents thought to be the problem. You heard Dr. Townsend about benzpyrene, phenol, cillistats, nitrosamines, tobacco-specific nitrosamines, and others.

Admittedly, there were technical problems with selective reduction. It was a moving target, and there were consequences, and adverse taste consequence as well. But Reynolds made the effort, and you should ask yourself, did Plaintiff come in this courtroom and say they shouldn't have undertaken that effort? Did Plaintiff come in this courtroom and say that effort was unreasonable? No, they did not.

Simultaneously, Reynolds undertook general reduction methods to reduce tar and nicotine across the board. Many other reduction methods had to be invented. You recall the testimony about filters, reconstituted and expanded tobacco,

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ventilation holes, and porous paper. Again, Plaintiff hasn't brought anyone into this courtroom to tell you that those efforts were unreasonable. Plaintiff hasn't brought anyone in this courtroom to tell you that those efforts should not have been undertaken. And at the same time -- at the same time -- excuse me -- Reynolds continued to work on low tar and extended brand lines and further continued to work on its Premier cigarette, and today it continues to work with Eclipse.

Were those efforts a success? Yes, they were a success. We take a look at the chart here. We can she how each of the design efforts that were undertaken by Reynolds improved the tar yields to reduce the tar yields from 1960 down to 1985 from a level of 37 milligrams down to a level of 16 milligrams. And we can see on this next chart that with Reynolds' extended lines of Salem Lights and Salem Ultra Lights, those low tar reductions were down to 9.7 milligrams and 4.9 milligrams from the 37 milligram level in 1957.

No one has challenged those numbers. No one has said that they weren't a success. Once again, Reynolds with its Premier cigarette that heats rather than burns tobacco, made further

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improvements to the point where, as you can see on this chart, with the amount of tar, there is barely a trace of tar with the Premier cigarette.

And furthermore, on this next chart -- a little bit unruly -- you can see where in the far right-hand column here the percentage of reduction of a lot of the different chemical components of

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cigarette smoke that had previously been reduced to some extent by all the general and selective reduction methods.

Additionally, there was a 1995 epidemiological study by Tang and Wall that is in evidence that indicated that about a quarter of the deaths from lung cancer, coronary heart disease and possibly other smoking related diseases would have been avoided by lowering tar yield from 30 milligrams per cigarette to 15.

Now, what does Plaintiff have to say in response to this effort by Reynolds to reduce the tar and nicotine levels in cigarettes in order to reduce the health risks of smoking? Plaintiff doesn't deny that for decades the public health community has been calling on cigarette manufacturers to reduce tar and nicotine levels.

Plaintiff doesn't deny that Reynolds had

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achieved a 60 percent reduction in tar and nicotine levels. Plaintiff does not say we shouldn't have are done what we did. But with the benefit of 20/20 hindsight, the Plaintiff says we either should have done something else, or that our efforts were not successful in reducing the risks of lung cancer.

Plaintiff raised the issue of smoker compensation. Now, Dr. Burns admitted just over a year ago in sworn testimony he gave in open court, he testified that lowering tar and nicotine levels in cigarettes had had real health benefits. This is Dr. Burns, Plaintiffs' expert from California, and Dr. Burns admitted that in the 1981 Surgeon General's report that addressed the precise issue. A report on which Dr. Burns was one of the editors, that it had concluded that lower tar and nicotine cigarettes had reduced the risks of lung cancer.

But in this trial, Dr. Burns who had no experience in cigarette design said that he was wrong in 1981. He says he was wrong a year ago. He says the entire scientific community had been wrong for decades. He says that billions of dollars that Reynolds has spent on producing cigarettes with lower levels of tar and nicotine hasn't had any benefit at all now in this trial, not before now in

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this trial because of compensation.

But compensation is nothing new. It was something that was expressly considered in the 1981 Surgeon General's report, the report that Dr. Burns edited. And Dr. Townsend testified that the Reynolds had studied the issue of compensation and concluded that while the net reduction in tar and nicotine received by the smoker is not as much as it would appear from the difference in tar and nicotine levels from high and low nicotine cigarettes, they still get less tar and nicotine.

And that is what the 1981 Surgeon General's report that Dr. Burns edited concluded, and that was what the 1995 epidemiological studied done by Tang and Wall concluded after examining 20 years of data in Britain. So you have to weigh on one hand Dr. Burns' complete about face with all the other testimony that we have, his sworn testimony

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from a year ago, the position taken by the Surgeon General in 1981, the major epidemiological study by Tang and Wall that Dr. Townsend relied upon, and Dr. Townsend's own testimony, a man with 23 years of experience in cigarette design.

Plaintiff further says that we should have made health claims regarding low tar and low

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nicotine cigarettes. Plaintiffs' main criticism of the low tar and nicotine products was that Reynolds didn't tell the public they were safe. That's simply not credible. Dr. Burns didn't say that Reynolds should have made those health claims. Mr. Merkel said that. What Mr. Merkel says is not evidence.

Dr. Burns wouldn't tell you that for a good reason. Dr. Burns knows Reynolds couldn't make those claims because the federal government prohibited them from making those claims. And that was brought out in the testimony of Dr. Townsend. Yet there is no dispute that despite the fact that Reynolds didn't make the affirmative health claims that Mr. Merkel says it should have made. Smokers know what the public health community has been saying for decades, that if you don't quit smoking low tar and nicotine cigarettes presents less health risks than higher tar and nicotine cigarettes.

That tar and nicotine numbers that are on every cigarette advertisement and that have been there for decades aren't some mystery to smokers, and they aren't irrelevant, either. Smokers know what lights and ultra lights are. They know what the Carlton and Now ads that tout the lowest tar and

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nicotine levels mean. They know they have less tar and nicotine. And according to the public health community, they present lower risks. Dr. Townsend testified at length about that.

Further more, there is no claim left in this case that Joseph Nunnally's smoking behavior would have been any different had he been told that smoking low tar nicotine cigarettes was safer. Additionally, Plaintiffs have admitted that there's no feasible safer alternative design to cigarettes.

JUDGE CARLSON: Just about 15 seconds away from the 15-minute mark.

MR. DAVID: Thank you, Your Honor. Plaintiff claims that we were negligent for maintaining the appearance of controversy over whether cigarettes caused lung cancer when Plaintiff claims no such controversy, in fact, existed. Reynolds has never denied that there are carcinogens in smoke. Reynolds has never denied that smoking is a risk factor for lung cancer, and that cigarettes can be habituating. There was, in fact, a good faith controversy as to causation that Dr. Townsend testified to at length about on cross examination. That because of the lack of a proven mechanism that many scientists outside of the tobacco industry took

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the position that it had not been scientifically proven that cigarette smoking caused lung cancer.

Reynolds worked hard and long to be

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responsive and responsible to the concerns raised about cigarette smoking over the past 50 years. It has provided its customers with cigarettes with a range of products all of which address the concerns of the public health community and which are consumer acceptable. Reynolds' research efforts over the past 50 years have, according to Dr. Townsend, been first class and the design goals been substantially met.

Reynolds has over the past 50 years and does manufacture and sell cigarettes that conform to the generally recognized state-of-the-art. In fact, in many instances, Reynolds invented the state-of-the-art. No one else has developed a feasible, alternative design for cigarettes during that 50-year period that is superior to or safer than those developed by Reynolds.

Scientists at Reynolds have been pioneers in cigarette design, particularly in areas of risk reduction. And have developed, for the first time, alternatives to the typical tobacco-burning cigarettes. An incredible achievement resulting

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from a clearly stated mission, and a regular consistent and systemic application of time, talent and money. Thank you.

JUDGE CARLSON: All right.

MR. ULMER: How much time do I have, Your Honor?

JUDGE CARLSON: 73 minutes, an hour and 13 minutes.

MR. ULMER: Will you give me about a 17-minute warning.

JUDGE CARLSON: Okay.

CLOSING STATEMENT BY MR. ULMER:

MR. ULMER: May it please this honorable Court, this has been a most unusual case in that we started off together going through individual voir dire, and now we've gone through a couple of weeks of trial, and I feel like I know each one of you. I know y'all know us. And you know our strengths, and our weaknesses. And I know I've got plenty of the latter, but I've tried to come to you as a friend to bring you information. And I have an hour and 17 minutes, and I don't know that I'll use it all.

But it's my plan over the next hour and 17 minutes to bring you information as a friend, and one of the things when we started this case, we

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talked about two very powerful human emotions, and they're called sympathy and bias. We all feel sympathy for Mrs. Nunnally. Mrs. Nunnally is a fine lady. She's done a good job raising her children. We have no quarrel at all with Mrs. Nunnally.

The same thing for Joe Nunnally. We have no quarrel at all with Joe Nunnally. I'm sure that Joe Nunnally was a fine man. I know that he was a good father. And I told you when we started that there would be some rough places in this trial where you would feel strongly about the Plaintiff and her case. And you would be torn, and each one of you committed that you would get through those rough places, and you would not decide this case based on

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sympathy. And you told me that, and I know each one of you told me the truth. That you will not decide this case based on feelings for the Plaintiff.

Now, the flip side of sympathy is bias, and the same thing when we started the case. I asked each one of you, you know, we're a tobacco company, and it's probably not easy to love a tobacco company. But I hope that over the past three weeks, we have come to you in such a way that you could see that we're honorable, hard working, credible people that are in a very, very, very

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controversial business.

Each one of you said that you would lay all of that aside, and that you would call this case straight up on the merits. Now, let's look at what the merits are just for a moment. R. J. Reynolds Tobacco Company is being sued for selling a legal product, which the Plaintiff has stipulated we have an absolute right to the sell, with known inherent risks. Risks that are built into the product, that are known in the product, like a firearm has known inherent risks. That carried a warning that was required by Congress, specified by Congress. They belittle the warning, but that is the warning that the United States Congress said should be on there. And maybe, most importantly of all, members of the jury, for which there is no alternative design. There is no way to make cigarettes safe.

If there was a way, if the Plaintiff could come in here and tell you here's what Reynolds should have done, and they didn't do it, and that killed Joe Nunnally. If Plaintiff could do that, I wouldn't be standing here. But we're dealing with a product for which there's no other way to do it.

Now, they want to talk about this 40 years ago and that 40 years ago. Well, get them to

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tell you something 40 years ago, or 20 years ago, or 30 years ago, or 10 years ago or yesterday that could have been done to our product that would have changed the outcome.

When Mr. Merkel gets back up, he issued me a challenge. As he talks to you, you think in your mind, Mr. Merkel, you tell me what is -- what could Reynolds have done other than not sell its product? Mr. Merkel told you in opening statement we had a choice. We had a choice not to sell the product. Now he's changed it completely. He said, "Oh, they've got a right to sell the product, but they just should be liable for selling the product." Even though it's a legal product that we have a right to sell that carries a warning specified by Congress that Joe Nunnally knew the risk of and for which there is no other way of doing it.

Now, members of the jury, a lot of you have family members that smoke, and you know what? They smoke cigarettes that are no better or no worse than the ones that are involved in this case. And so the issue you've got to decide is if my relative comes down with some smoking-related disease, should they the be able to sue and recover. And that's the decision that you're going to make in a little

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while. This case is so unlike any other tobacco case, it's so unlike any other product liability case, we have a case with no defect. It's almost -- this is a product liability case, and to have a product liability case, you have to have a defective product, unreasonably dangerous.

We have a case with no defect. It would be like having a product liability case and not having a product involved. So where we are, members of the jury, and what you've got to decide are essentially three things. You've got to decide are cigarettes, as defined by the Court, defective and unreasonably dangerous. You have got to decide that. Are these cigarettes that Joe Nunnally smoked defective and unreasonably dangerous? And there's a set of criteria that I'm going to go through very carefully with you to help you make that judgment.

The second thing you've got to decide is whether or not smoking cigarettes caused Joe Nunnally's lung cancer, and I'm going to talk to you about that in some detail. The third thing you've got to decide is whether or not Joe Nunnally knew the risk, appreciated the risk and assumed the risk of smoking. And was, therefore, responsible under assumption of the risk. Did he know the risk, did
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he appreciate the risk, and did he understand the risk? And I'm going to talk to you about that, too, in some more detail as a friend over my hour and now seven or eight minutes to present R. J. Reynolds' side of the case.

Now, Mr. Merkel went through the jury instructions, and I'm so glad that he did, because as I watched y'all, I wondered what y'all were thinking about all the goings on in this case. What were you thinking? And I think one of the things you were thinking is give me some law. Somebody tell me what the parameters are. How do I make my judgment? How do I make my decision? And this honorable Court has now given you the law. And there are a number of things that the Court has told you that I'd like to go over with you and maybe, in a cursory fashion at this point, and then in much more detail as you go along.

One of the things the Judge told you is you're -- you're required and expected to use your good common sense and sound, honest judgment in deciding this case. And when we're in voir dire, you were asked all these hard questions about what would you do here and what would you do there, and will you lay this aside, and will you not lay that
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aside? But the Court is telling you don't lay aside your good sense, don't lay aside your good common sense. Don't lay aside the values that make you what you are. Don't lay aside the values that make this community strong. And one of the values that make us strong is we value the right to choose.

In this country, we value that right. I choose to do some dumb things. I choose to do some frivolous things, but I have the right to choose, and when I have the right to choose, I've got to the

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bear the responsibility. It happens to every one of us. There's not one of us in life that gets a free ride. I'm fat, I don't exercise like I should. I eat the wrong things. And you know what, I know, I know, I know, but it's 30 years away, 40 years away, and I say, okay, I'm going to eat ice cream again tonight, and I do. But I know, but I choose to live that way.

I choose not to live on bread and water. I choose not to be a vegetarian. I'm not criticizing anybody that is, don't get me wrong, but I make that choice. And what the Court is telling you is don't, when you come into this the room, be so bound up that you don't apply your good -- your good common sense and your good spiritual values to

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this case. He's not asking you to do that.

Now, further in the instructions, the Court has told you that the party that claims something has the burden of proof. The burden of proving their case by a preponderance of the evidence. The Plaintiff in this case, Mrs. Nunnally, has the burden of proving that our cigarettes are defective, and unreasonably dangerous and proximately caused Joe Nunnally's death. That's her burden. And if you go back in that room and you say I don't know, I heard all that, and I don't know, then the Plaintiff has not met her burden of proof.

Now, Mr. Merkel is going to say, and rightfully, that we have the burden of proof on one issue. We have the burden of proving that Joe Nunnally knew the risk of smoking, appreciated the risk of smoking and voluntarily exposed himself to those risks. We have the burden there, and I'm glad I've got it, because I'm going to show you how we meet it completely.

Now, the Court has told you in these instructions that one -- this is kind of the meat of the coconut. It's an instruction that when you get back to the jury room will be labeled P-2A/D-10.

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What the Court is telling you is if a company manufacturers a product that is defective and unreasonably dangerous, that company is responsible for that. But the product has to be defective and unreasonably dangerous. You don't sue people for making products that are dangerous. That's not the test. If that was the test, then everybody would be done. Chewing tobacco would be out. I mean, just come into court, and it would be over. Tobacco would be out. There are dangers associated with the use of those products, alcohol.

Mr. Merkel said alcohol is different from tobacco. They tell you how much to drink. Well, I ain't never seen them telling you how much to drink on the side of a bottle of whiskey. I've never seen them tell on you on a bottle of whiskey, and I don't drink the stuff. But I have one over here, empty, empty, members of the jury. They don't tell you they get cirrhosis of the liver from the bottle of whiskey. But on our tobacco products, we tell you that there are health risks associated.

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Mr. Merkel wants to talk about, well, you know, Mr. Nunnally started when he was real young back in the early '60s and that sort of thing. But what he didn't tell you is they don't have a failure

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to warn claim of any type, any time in the '40s, '50s, '60s, from the time of Joe Nunnally's birth in 1952 forward. They have no failure to warn claim, and don't be fooled. They have no such claim. What they have is a design defect claim. And the first issue you've got to decide when you get to the jury room is are these cigarettes which can't be made safer, are they defective and unreasonably dangerous under what's called the risk utility analysis which I'm going to go through with you on a board in just a minute.

Now, finally -- not finally, but furthermore, the Court has told you, and I'm going to read this one, "If you find from a preponderance of the evidence that Joe Nunnally knew and appreciated the risks of smoking and voluntarily exposed himself to those risks, then he was negligent. If such negligence was the sole cause of his death, then your verdict must be for R. J. Reynolds." And I submit it is absolutely undisputed in every respect that he knew the risks. He appreciated the risks. And he exposed himself to those risks repeatedly, hundreds and hundreds and hundreds of times from whenever he started smoking.

No, the Court has told you that -- that

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the Plaintiff has to prove what caused Joe Nunnally's cancer. They must prove that smoking caused his cancer. And finally, members of the jury, on the instructions, you will have an instruction that guides you through your decision-making process. It's called a special interrogatory, and it's in four parts. And I'm going to talk about that in more detail as we -- as we get into my argument.

Now, I told you when we started the case what we were going to prove. We proved everything I told you we were going to prove. We told you that Joe Nunnally started smoking for reasons of his own. Those were my exact words, and that was exactly right.

Now, I have a board here that captures Mr. Merkel's opening argument, and he uses language that I would never use with respect to Mr. Nunnally. I don't want anybody to be mistaken, but this is not my words. But in the opening argument, it was stated that Joe Nunnally was born in 1952, and in 1960, he should have been picked up, spanked, slapped, shaken. But at the instance of his big brother -- he didn't say big tobacco, didn't say R. J. Reynolds -- his big brother, 10-year-old

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brother, Joe Nunnally began smoking cigarettes, a stupid act by an eight-year-old child. He goes on to say if he wasn't negligent, he was certainly stupid, again language I would never use. He was a foolish eight-year-old child that went along with his bigger brother. And we don't deny that, that he

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went along with his bigger brother and peer pressure, and there's no proof to the contrary. And you know what, members of the jury, there is no proof to the contrary. Mr. Merkel got it exactly right.

R. J. Reynolds did not cause this young child to start smoking. He started smoking for reasons all his own. Now, a couple of more things in here I want to cover with you. We asked the Plaintiff to admit that they don't allege that the Winston, Camel, Doral or Salems that Nunnally smoked contain any supplementary nicotine or was spiked with nicotine. And the answer to the that was they admit.

Now, the point about that, members of the jury, is you've heard, and you've read, I'm sure, about the allegations that spiking -- and you probably came to this box thinking maybe that's what this case is about, maybe --

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MR. MERKEL: Excuse me, Your Honor, I think counsel is arguing totally outside the record here about what they may have heard somewhere else, and we're using a sword and a shield at the same time on some of the this stuff now.

JUDGE CARLSON: As to that particular comment, I'll sustain the objection.

MR. ULMER: There's no allegation here of spiking. There's no allegation here that we -- we got him started or that we hooked him with supplemental or spiked nicotine. There's no claim like that in this case. Now, one or two other points that I want to make before I move on to another area. And that is the only person that testified that Joe Nunnally started smoking when he was eight-years-old, was Ben Nunnally. You heard very brief testimony from Ben Nunnally, but I bet each of you remember Mr. Nunnally.

Everybody else, his other brother, Guyton Nunnally, said he didn't start smoking at that age. I lived in the house with them, and he started smoking, I think, later on in his childhood. I don't know that it's of particular importance, but I think you could legitimately question the credibility of Ben Nunnally as to when this young

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boy started smoking. And I bet each one of you have eight-years-olds or you know eight-year-olds, and it just defies my ability to comprehend that a eight-year old is going to start smoking and regularly smoke.

I didn't say anything about 13-year-old or 14-years-old because I've been through all that. They'll do about anything, and I was that age, too, so I'm not being critical. So I don't think it's credible as to when they say he started smoking. Do you remember Mrs. Pauline Harris, the older lady in the purple dress that the came here? She told you she taught him in the first grade. She despised smoking. She can smell it on people. And she said my goodness, I have no idea he was smoking, and I don't believe he was smoking. So I think the truth of the matter is, members of the jury, is that he

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started smoking much later than they suggest right here.

Now, we told you when we opened this case that we were going to prove that Joe Nunnally knew the risks of smoking. We said we were going to prove that he knew the risks of smoking, and we gave you some examples. And we proved each one of the things that we told you we were going to prove. The

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board's a little crooked. I'm sorry. My board's not crooked, but my easel is. We said that we were going to bring you Pauline Harris. Ms. Harris, you remember here. She came before you, and she said that I taught him, I stressed it very much, they should not smoke, and he took the tests. He knew. I explained to them that smoking would deteriorate their lungs.

You heard the Plaintiff say Mrs. Harris didn't say anything like that. She said it may be a little bad for you. But she said it would deteriorate their lungs. It would cause breathing problems, it would shorten their life. Jimmy Fischer came before you and testified about growing up and going to high school with him. Kirk Barnes said I went to school with him. And it was common knowledge, the knowledge of cancer was common knowledge, that Joe Nunnally used the phrase of "cancer sticks" and "coffin nails" even back in high school.

Other witnesses came before you, Jennie Lee Hyde said to you, we were talking earlier about these group sessions, and Joe Nunnally was among the students, and she took him into these sessions, and she talked to him about the dangers of smoking.

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Guyton Nunnally testified was Joe Nunnally aware of the health risks that had been associated with smoking? And he said I would -- this is his brother, now, members of the jury, his brother, he said, "I would think he would have been aware as most of us are. I don't see where he would have been isolated from that information." And of course, he wasn't isolated from that information.

This controversy about smoking and health has been the most persistent and the most highly talked about controversy probably in the history of the country. So we've proved to you -- and you know what, I haven't heard one witness from the Plaintiffs say that Joe Nunnally didn't know the risks. Have you heard anybody say that? Has the Plaintiff brought anybody here to say he didn't know, he was special, he did not know?

It is uncontroverted, members of the jury, that Joe Nunnally knew the risks of smoking, he appreciated the risks of smoking, and he smoked because he wanted to. Now, the Plaintiff wants to put before you these advertisements, but nobody testified that Joe Nunnally saw these advertisements, not a soul. And they belittle the advertisements, like they belittle the Surgeon

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General's warnings that appeared on cigarettes from '66 to '70 and '85, I'll put them up on boards.

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They belittle them. At the talk about them, they say this, they don't say that. Members of the jury, that's Congress doing that. Congress made the decision that's what it should say.

Now, they can quibble with Congress, and they can say Congress didn't do its job. But Congress tried to do its job, and they act like well, Congress is just a bunch of pawns to the tobacco folks. Well, give them some credit. Y'all know congressman, y'all know senators. By and large, 90 percent of the time they have the good of this country at their heart.

And Congress, knowing what was said about tobacco in the '64 Surgeon General's report said it should be a legal product. Now, they put the ads up here, and they say look what we did, look what we did. Look at these ads. But members of the jury, what should we do? You know, we want to advertise our products. Should we put just words on paper? You know, when you hear the Budweiser folks. What is it, the frogs and the lizards and those people you hear on the radio, I hear them all the time, I guarantee you they're next. Because they'll say

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well, they were appealing to youth, they were trying to get people to drink. They were trying to make it attractive. But I don't know how many of y'all sell products, but when you sell something, I mean, you want to sell your product. It's silly to be in business and not want to sell your product. So I don't know -- I don't feel like I need to apologize for any of these advertisements that were put in the -- in the newspapers.

Now, we told you in the opening arguments that we would prove that Joe Nunnally could quit smoking. We said we're going to prove that he could quit smoking. That addiction is just a label. That people, when they're motivated to quit, they can quit, and you know what, Dr. Burns admitted that people quit. That there are more former smokers in this country than there are smokers, that -- and I have his testimony right here.

Dr. Burns said, "People can stop smoking, and many people have successfully stopped." He says, "I agree with that." And there are 45 to 50 million people that quit smoking. He says, "yes," and he says that, "In fact, you testified in this very case that you had no reason to believe that Joe Nunnally could not quit smoking?" He said, "That's

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correct. There's no prohibition of that, to his being able to stop."

Now, their own expert has come before you and proven our case for us in that respect. Joe Nunnally could quit smoking. Nobody contends that he could not. You heard Dr. Seiden, the psychiatrist. Psychiatrists are always so interesting to me. Because they can express in words the things that are going around in your mind that you can't really articulate it.

And he told us things that we all already understood, that when we want to do something, you know, we try to find a way to do it. If we want to

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do something pleasurable, we really don't want to stop. If I know I shouldn't over indulge with ice cream or whatever I like, I'll find a way to say well, I didn't eat lunch today. He testified without equivocation that Joe Nunnally could have stopped smoking.

And you know, one of the most important things that Dr. Burns said, the Plaintiffs' own expert, he said that Joe Nunnally could have stopped in 1978, and that if he had stopped in 1978, you know what, none of us would be in this room. That more likely than not, he would not have contracted

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any type of lung cancer, if he had simply stopped 10 years before his diagnosis in 1978.

So we told you we were going to prove that he could quit, and we've proved that he could quit. And I don't think I've heard anything to the contrary out of the Plaintiff that's saying oh, no, he could not have quit. In fact, members of the jury, Joe Nunnally did quit smoking. He quit smoking the first time that he tried to quit smoking.

Now, we talked to you in the opening about the benefits of quitting, what happens when you quit? Does your risk of lung cancer go down? And yes, it goes down dramatically. It goes down to the point that after 10 years, your risk approaches that of a never smoker. If he had quit and if he had chosen to quit, but Joe Nunnally, he chose to smoke. Nobody made him smoke. Nobody made him smoke, and he chose not to quit. And he exercised his right to choose, just like you have the right to choose, and you have the right to choose. Every one of you have the right to choose.

He exercised the right to choose, and members of the jury, that's what this case is about, ultimately, is do we have the right to choose or

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not? And then do we have to shoulder the responsibility for the choices that we made?

Now, there is no proof of any type in this record of any defect in our product. There's no proof of that. When Mr. Merkel's up, you think to yourself, and you ask yourself, okay, it was a Salem cigarette. Was there a manufacturing defect? In other words, did we get our specifications wrong in these cigarettes? Did something get in there that wasn't supposed to be in there? Did something go wrong? And of course, they have no claim like that.

Warnings, the warning claim has been thrown out of the case in its entirety from beginning to end. Design defect, ask him, and ask yourself what could we have done, what could we have done that would have changed the result? What could we have done? He wants to talk about cholanthrene or this, well, ask him, you know, if cholanthrene was taken out, would that make cigarettes reasonably safe?

Let me tell you what the proof is on this point. In -- I'll start with the bottom. We asked Dr. Burns, "You said you have testified, Dr. Burns,

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on many occasions, that there is no such thing as a

safe cigarette?" And he says, Answer: "As they are currently manufactured, there's no such thing as a safe cigarette, that's correct." Question: "You can't make a safe cigarette that burns tobacco, you agree with that statement, don't you?" He says, "That's correct."

It is admitted nine ways to Sunday that there's nothing that R. J. Reynolds could have changed, taken out, put in that would have altered the result here. The only thing, members of the jury, you can say to us is we shouldn't sell our product. And Congress has said that that is not an appropriate result. Congress said that we have the right to sell this product, and people have the right to buy cigarettes.

Now, I want to talk to you for a few minutes about something I think is vitally important. What I have put up before you is called the risk utility factors. When you're trying to decide if these cigarettes are unreasonably dangerous, you've got -- you've got some guidance from the Court on how you go about doing it. And the first item here is the "usefulness and desirability of the product." And I don't want to repeat myself, but I will just a little bit if you

don't mind.

I told you in the opening statement that the issue here is who gets to decide on the usefulness and desirability of the product? Is it Mrs. Nunnally after the death of her husband? You know what she's going to say. They have no usefulness, they have no desirability. Or is it Joe Nunnally during his lifetime? Joe Nunnally, I submit to you, had the right, and he made the choice. He thought cigarettes were desirable. He wanted to smoke. He made the choice. So I submit to you the issue there when you're in the jury room is who gets to decide? And I'm telling you that I believe you will conclude that it is Mr. Nunnally.

The second point on usefulness and desirability of the product is, I'll submit to you, that it has been decided. Congress has decided not to out law cigarettes. Congress made the decision. Congress, with full knowledge in 1966, said, "We're not going to out law cigarettes, we're not going to outlaw them. People have the right to choose."

And so two points there the usefulness and desirability of the product, Joe Nunnally had the right to choose, and Congress has made the choice. But I want you to think as you go along,

and I don't want to be flippant about this. Because this is not anything to be flippant about. It could not be more serious. But as you go -- as you go through the case and you're deciding on the usefulness and desirability of that product, think about other things that we do that we do just for our own pleasure, and chewing tobacco is one.

I don't chew. I bet most of you think it's nasty, but some people like it. When they go

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fishing, they want to the chew. I've got Skoal here, some people like it. But can you imagine when you start really evaluating the usefulness and desirability of this product, most people would say, well, I don't think it's got much. But it's got something to the man that goes fishing or goes to work and wants to dip or chew. It has usefulness to that individual, and we don't have the right to say what you should do as long as you don't hurt other people. If you hurt other people, that's another matter.

I've got an empty Budweiser can that I promise you I found on the street, and this Budweiser can, you know, what are we going to say? Is there any -- is there any usefulness, is there any utility to this if somebody gets killed in a car

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wreck, or they get cirrhosis of the liver, or we have young people who become alcoholics. I can tell you from personal experience that there ain't nothing in the world worse than that, nothing. It's a killer. But should you take it off the market? Should you -- should you outlaw it? We tried that one time, members of the jury. We've got a right to choose, and people choose to make this product and these products legal.

The safety aspects of the product is the second feature right there. And hope you'll work with each one of these, because Reynolds wins every one of them, hands down. The safety aspects of the product. You heard Mr. Townsend testify to what Reynolds has done. We spent millions of dollars in untold effort trying to reduce the risks to smoking. And you know what, if we hadn't, I wouldn't be here, I wouldn't be here. But we have tried. We've done everything that could be done, and it's -- and they've admitted there's nothing we could do or change to make our product safer.

The third one is the ability to eliminate the unsafe characteristics of the products. In other words, what can we do to eliminate the unsafe characteristics, and there's nothing that we can do.

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Feasible alternative design, they've admitted there's no feasible alternative design. 5, the ability of the user to avoid danger by the exercise of reasonable care. We all have choices. We can choose to do what we choose to do, and 6 is Nunnally's awareness of the dangers inherent.

We win every single risk utility factor, every one of the factors. And that is the most fundamental and the most important decision you've got to make is are cigarettes defective and unreasonably dangerous. Mr. Merkel wants you to split it. He wants you to say look for what Reynolds did and Mr. Nunnally did, and I'll ask for 5 million dollars and split it down the middle, and give you two-and-a-half million dollars, and I'll be as happy as I can be. That's the object right now.

The first decision you've got to make is are cigarettes defective and unreasonably dangerous before you ever get to any of the other issues in this case, and that's the very first question on the

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form, and I submit to you it should be answered no, that cigarettes are not and unreasonably dangerous.

The final factor, I've handwritten it in, I didn't write it very good, in fairness, it's in the jury instructions, I ought to give it to you.

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It said spreading the loss by setting the price. In other words, can we reduce the loss by increasing the price of a pack of cigarettes. I guess that's possible, you know, we can spread the loss, by every automobile accident being blamed on the car company. We can spread the loss by blaming the food company any time anything goes wrong. We can so spread the loss until none of us can eat or drive or afford what we want to do. There comes a time when spreading the loss winds up in your pocket book.

Those are the risk utility factors you should use in deciding whether this product is defective and unreasonably dangerous. And I'm winding down. Your Honor, how much time do I have? I'm sorry to --

JUDGE CARLSON: About 40 minutes, might be a little off.

MR. ULMER: I won't wind down that quick. If you'll forgive me, I'll wind up for 10 minutes, and I'll wind down for 10. Okay. Now, the Plaintiff has the burden of proving that Joe Nunnally died from squamous cell carcinoma. That is the Plaintiffs' burden of proof.

Now, I want you to think about the proof that they brought to you on that issue. Did you

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hear from Doctor -- you heard from Dr. Fidler. He's up in Memphis. He did not come here live. He came here by deposition. And they read the deposition to you. And you know one of the things that you may or may not remember, do y'all know how long that Dr. Fidler looked at those seven slides? 10 minutes, 10 minutes, and he made the judgment that this man had squamous cell carcinoma -- and I'm not criticizing Dr. Fidler, but I just want to make a point. Everything -- their whole case there is based on a 10-minute look.

Dr. Burns, do you remember Dr. Burns? That Dr. Burns, they criticize our witnesses for what they charge, but he's got the record, y'all. He charged $500 an hour. And you know how he came about that job? He worked for the public health service for the government in 1974 for two years, and he's parlayed that two years of government service into the finest golden parachute that's ever been. There's never been a better golden parachute. He goes around the country testifying in all the trials.

They said our guys have been in the two or three. He's been in 50. He makes a living doing it. He gets grants to his college doing that. And

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he makes all that money doing that, and you know what, he didn't look at the pathology. He didn't look at the radiology, yet he said Amen, Amen, I know they were right. I didn't even look, Amen. That's not fair, members of the jury. That is not

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right.

What they've got is one witness that looked for 10 minutes, and then Dr. Burns who came in and just blessed what was done. And we have brought to you, I think, some of the finest witnesses from anywhere in the country. Dr. Lang, the nice older gentleman from -- from Europe, from down in LSU country, he was a radiologist. He talked to us about the features of this cancer. And I'm not going to go back through all of this, so don't flinch too much.

But Dr. Lang said radiologically that this tumor as far as size, its massive size, he's never, in 40 years, seen a squamous cell carcinoma that large at presentation. Because you don't live with a squamous cell carcinoma that large in your body. It's unheard of. You don't do it. He says its size is inconsistent with squamous cell. Its density, remember what he said about it was homogenous in appearance.

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It was not necrotic in the middle, and a characteristic -- and the gold standard for seeing a squamous cell carcinoma of any size at all is that it's necrotic in the middle. And it's necrotic in the middle because it grows like this and looks like this. It looks like a gum ball. It's spiculating, and it grows out, and it's growing out searching for blood. And when it outgrows its blood supply, and it dies in the middle. That is the gold standard for looking at a squamous cell carcinoma.

We didn't have that here. We didn't have a mediastinal shift. A squamous cell carcinoma of this size sitting right next to a lymph system right here, it's unheard of it for not to involve the lymph nodes. The direction of growth is wrong. The shape was wrong. Again, you remember how round it was, perfectly round it was, it was not spiculated or shaped like this gum ball.

We then brought you in Dr. Bennett, and they talk about our experts from being far away, but the last time I looked, San Diego is farther than Shreveport. It's farther than New Orleans, and it's farther, probably, than Billings, Montana. So that doesn't have anything to do with the case, though, as to how far anybody came to testify.

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But Dr. Bennett went through all the features. This man presented with three lesions, and Dr. Burns, the Plaintiffs' expert said that presenting with multiple lesions is consistent with something other than a squamous cell carcinoma. He says the average size at presentation of a squamous cell carcinoma is three to five centimeters. He agreed with all of that. We've got a 36-year-old man at diagnosis, 36-years-old, members of the jury, doctors with 70 years experience said they have never seen squamous cell carcinoma in a 36-year-old man. It just doesn't happen.

Now, everything happens, so when I say it doesn't happen, I mean it is extremely, extremely, extremely rare. And that's what the medical testimony was on that point. Dr. Bennett, he went

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to the trouble of making photomicrographs where he could show you and let you make a judgment. Not just trust me, not I'll read you a deposition and trust me. The medical records say this nine times.

But the medical records say it nine times because of the one diagnosis. They didn't rediagnose it all nine times. Dr. Bennett went through the absence of precursor lesions in the bronchus. You saw the actual lung. You saw the

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chart from Dr. Burns. Did you see, in looking at the chart, from looking at the lung and comparing it to the chart, did you see anything like that? Of course, you didn't. And they draw these tumors as black. You saw the tumor. It's not black. It's pink.

Now, Dr. Bennett told you that the tumor was not obviously part of the bronchial tree. Well, I'm not very good with medical terminology as y'all have learned. I'm probably not very good with a lot of things. But one thing I do understand if you're going to get a smoking-related disease you ought to get it where the air comes in and where the air goes, and that was not the case here. Dr. Bennett took you through all the features of the cells that told you it had none of the features of squamous cell carcinoma. We submit to you, ladies and gentlemen of the jury, that the Plaintiff has not met their burden of proof there, and this was a sarcomatous lesion and not a squamous cell carcinoma.

Now, I want to do just a couple of more things. And that is to deal with some of the things that Dr. Burns said, and I've got to tell you that -- I don't know if everybody can see this or

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not. I'm going to help you read it. Dr. Burns, you'll remember, testified for the Plaintiff, and he -- they built their case around Dr. Burns, Dr. Burns and the feelings that we all have for this family.

Dr. Burns says that cigarettes are -- have no utility. They have no utility. Now, I understand that. I understand that he worked for the public health service. I know he's getting paid $500 an hour, so it doesn't shock me for Dr. Burns to say that cigarettes have no utility.

He says that "All cigarettes on the market as currently configured are unreasonably dangerous." So what he's saying is that all cigarettes on the market are defective and unreasonably dangerous. Then he comes around here to number 3, and he says, "They can't be made safe. No matter what you do, you cannot make a safe cigarette."

Here's the interesting part. We're going to take you around the whole circle of reasoning with Dr. Burns. Dr. Burns says "But they should not be banned." Isn't that an interesting idea? He says they should not be banned. He thinks they have no utility, they can't be made safe, they're all

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defective and unreasonably dangerous, but they

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should not be banned. He was asked, "You have never supported making the sale of cigarettes illegal?" He said, "That's correct."

Let's go on around the circle, this circular reasoning by Dr. Burns. Society has decided. He says society has decided with knowledge of the risk that cigarettes should be legal. Society has made the judgment. In other words, we've weighed it out as a people, as a group as a group, and we've decided, we know the risks, and we know the down side. Society has made the judgment.

And then much more interesting, adults should be free to smoke. He says, "That I think that that's something that adults have the right to make a decision on." "And you think that people should be free to smoke if they choose?" "I think that if people can smoke responsibly, not injure others with their smoking, for example, that they should be allowed to smoke, that's correct."

Coming all the way around the circle now, all these other things, they should be allowed to choose. Here's the clencher. "If an adult chooses to smoke with the knowledge and appreciation of the health consequences, do you agree they should bear

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the consequences of their actions?" Right back to where we are. If you have a right to choose, should you bear the consequences? He says, "I think they do bear the consequences of those actions." Next question, "Do you agree with this statement, Dr. Burns, that people who smoke cigarettes do indeed suffer the consequences of that behavior and they are responsible for their own behavior. The fact that they are addicted does not free them from other responsibilities of life."

And he says, "I agree with that statement, that's correct. I agree with it because I believe it to be true, and I so testified under oath." So Dr. Burns has brought us in this great big huge circle from I think they have no utility, to they should not be banned, to I think adults should be permitted to smoke, and I do think they ought to be responsible for their own actions.

I submit to you that's where -- exactly where I am, and I suggest you should be, too. That people choose to smoke because they want to smoke and that if they choose to smoke or to undertake any other activity that they should -- they should be responsible for their actions. It's just that simple.

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Now, when you get into the jury room, you're going to have a jury verdict form, and it will look like this, and you'll have other instructions that go with it. But the first question is "Do you find, from a preponderance of the evidence, that the cigarettes designed and manufactured by Reynolds and smoked by Joe Nunnally were defective and unreasonably dangerous?" And you answer yes or no. And I submit to you the answer is no. If you answer no, you go no further, your job is done.

Second question, "Has Plaintiff proven by

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a preponderance of the evidence that the defective and unreasonably dangerous condition designed by Reynolds proximately caused or contributed to Joe Nunnally's cancer?" And I submit to you the answer is no. The Plaintiff has not proven that his condition, his cancer was caused by smoking. I don't think you'll get to two, but I think the answer is no if you do get to two. And third and fourth, fourth is damages, and I submit or suggest you'll never get there.

But number 3 asks, "Do you find that Joe Nunnally was negligent by knowing and appreciating the dangers?" And if you get here, I urge you to

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put only 100 percent in there. Because let me tell you, if you put anything less than 100 percent, it means that there is a verdict for this Plaintiff in this case. And what that means is that everybody that buys a pack of cigarettes from all the way past to all the way forward has got a contract of insurance and --

MR. MERKEL: Excuse me, counsel. Objection, Your Honor. This case has nothing to do with any other case anywhere in the world, and counsel's argument is improper.

JUDGE CARLSON: I sustain the objection.

MR. ULMER: I urge you, members of the jury, when you get into the jury room to find that our cigarettes are not defective on are unreasonably dangerous and to return a verdict for R. J. Reynolds.

Now, just a couple of more things before I quit. I hope -- I have enjoyed being up here, and I've enjoyed presenting evidence to you. I know it's been hard on you. It's been hard on the lawyers. Everybody's worked hard. It's hard on the clients. The Court has been extremely patient with us, and for that, I'm grateful to the Court. But I just want to close with just a couple of things for

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you to think about.

You know, it was -- it was odd to me that when the family testified that no member of the family said that, you know, dad said don't smoke, don't smoke, or told his children or his friends or whatever. But Joe Nunnally never said anything to anybody about not smoking. Joe Nunnally took responsibility. If he -- if he had blamed cigarettes or if he had wanted a lawsuit, he would have told somebody. He would have said something. The other thing is that two of the children that have grown up with this lawsuit now smoke.

And I don't know what to make of that, and you can make of it such as you think is appropriate. But as I said earlier, this case is more than about this case. This case is about everything. It's about us. It's about the way we live. The way we choose to live, and the choices we make. That's what it's about. And when you go into the jury room, you've got to decide, you know, are we going to live in a society where we do what we want, and when things don't turn out right, that we blame somebody else?

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Is that the society we're going to live in, or are we going to live in a society that is

responsible? And I submit to you that if we have the right to choose that we have to bear the responsibility. And I urge you to think about -- about those things as Mr. Merkel talks to you. He's going to talk to you. I can never say another word to you. It's in your hands. I told you when I started this case that I trusted you. And I do and -- completely, but when Mr. Merkel gets up, he's going to have the floor for 40 minutes.

But think about some of the things that I've talked about and in your mind ask -- you can't ask him, but ask him what could we have done or changed to make our cigarettes safe, because they've stipulated that there's nothing. He's going to try to get you to say well, let's share the responsibility, let's share the responsibility. What he's asking you to do is to avoid your responsibility of deciding straight up are cigarettes defective and unreasonably dangerous. That will be the effort to share it, you know, put it up -- I'll run the damages up to 5 million dollars, then I'll convince the jury to split it in half or whatever.

But don't -- please don't avoid making the hard call. Are cigarettes defective and

unreasonably dangerous. And that's the test, I've gone through the factors with you, and it's not are cigarettes dangerous, of course, they're dangerous, but that's not the test. The test is are they defective, and as he talks to you, ask yourself what is defective? What was wrong with those cigarettes?

And I'm grateful for this opportunity, and I urge you to deliberate carefully, and to consider the law, consider the evidence, take what time it takes, and I respectfully ask you to return a verdict for R. J. Reynolds Tobacco Company. Thank you.

JUDGE CARLSON: All right, ladies and gentlemen, let's take a short recess before we move into the final phase of argument.

(A short break was taken.)

JUDGE CARLSON: All right, then, ladies and gentlemen, we'll go forward. All right. Mr. Merkel.

CLOSING STATEMENT BY MR. MERKEL:

MR. MERKEL: Ladies and gentlemen, I wish I could tell you that I was having fun here, too, but I haven't enjoyed this three weeks at all. And the reason I haven't is I just am burned and appalled at the sheer arrogance of this industry

that's killing 400,000 Americans a year, one every 78 seconds. And comes in here and tells you they don't want to be responsible for it. Somebody else ought to be responsible for it. Somebody that made the choice ought to be responsible for it. And that does, that burns me. There's no two ways about it.

You've seen corporate America at its worst with a smoke and mirror worthy of the

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industry, flashy boards, fancy charts, expert witnesses from all over the world, 25,000 here, 20,000 there to come in here and tell you that they are not responsible. That Joe Nunnally made the choice, Joe Nunnally did it all.

Where does an industry get off with the arrogance that they are so sacred that they can knowingly, for 50 years, sell a deadly product and never be responsible for a bit of it? They tell you well, we can't make it safe. Well, they spent three-and-a-half hours with their Mr. Townsend, their professional witness, on the stand telling you all the wonderful little fascinating things that they had the done to try to make it safe.

And what did he tell you for one thing, they've reduced the tar way down, and if you didn't compensate, that would make it safer. And one of

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the things he told you was they had one cigarette brand or a group of cigarettes that were down to .1/10th of a nanogram of tar. And I asked him, I challenged him on it, and I said does that make it safer, Mr. Townsend? And he said well, we couldn't prove it because epidemiological studies have to go on for 20 years. So we couldn't prove it made it safer when we first started putting filters on and doing all of this. But now there's a study that proves it's safer.

And then I went to his deposition in another case, and I asked him about that statement he made there. Now, the .1 percent nicotine level, what share of the market does that have? A very small share of the market, a few percent. What percent? It's a few percent. Three? I would say it's less, certainly less than two, maybe less than one-and-a-half. The lawyer said less than one? I haven't seen the numbers on it. Why is it less than one percent of the market? That's the one that Mr. Townsend told you in his heart of hearts is safer. It does have less tar, consequently, it has less nicotine. But he said well, they don't like it. People don't smoke it that well.

You remember they had another one that

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they took off the market. They showed you the graph. I think it was something that went with Tempo or something like that, and when the graph went down, he said well, it went up a little, and then it went down, and we discontinued it. Why does the safe brand have less than one percent of the R. J. Reynolds' market? The because they still sell the deadly ones. Why?

They want to make a safer cigarette, they've made it. Mr. Townsend told us they made it, swore to you they made it. Why are the others still there? Nobody says the others have to be kept. Nobody says that R. J. Reynolds or anybody else has to sell any product. That is a choice made by a bunch of adults with MBAs and Ph.Ds and all sorts of degrees, 700 scientists these people hired at one point. They're making the decisions of what they're going to do, and how they're going to spend their money.

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They're making the decisions about what they're going to sell, and if its sales don't go through the roof, they're not going to sell it. If it has one percent of the market, they're not worried about it. They're not going to push it, they're not going to use it, even though it's safer

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in Mr. Townsend's own words. Why? Because of the all mighty profit. And that's the reason that these cigarettes have been sold like they are now for over 50 years.

The only purpose of a cigarette, the only utility of a cigarette is to make a profit for R. J. Reynolds, and its buddies in the system.

Now, as far as the Court's instructions and the law, this abbreviated version like so many of their charts, isn't what the Court said. It doesn't say usefulness and desirability of the product, end it. It says the usefulness and desirability of the product, its utility to Mr. Nunnally and to the public as a whole.

Now, what utility? Let's go back to square one, before anybody smokes, what is the utility of a cigarette to a nonsmoker? You divide your public, your whole country into two categories. And those who have become hooked, yes, they have a craving for it. They're habituated to it. They may need it. They may have difficulty smoking it.

But to the rest of us, those who have never smoked or are not smoking, what utility is it? None. We don't miss nicotine if we've never had it. We certainly don't miss coughing our heads off if

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we've never had smoke in our lungs. It serves no purpose. No medical doctor in the history of this country has ever prescribed smoking to someone. It serves no other purpose except to sell for 4 bucks, or 5 bucks or whatever the things go for a pack so that R. J. Reynolds can make a profit.

But at what cost is that profit? 400,000 deaths a year, is that unreasonably dangerous? Does the risk of that justify the utility? If we made one that's 1/10th of a nanogram of tar and nicotine that is truly safer, why not put it out there? The well, for one reason, the nicotine kick isn't going to be there. It's not going to hook the next generation as badly. They're not going to come back for 40 years smoking it, because it doesn't have that effect, and they may lose a few smokers that are smoking now, because it doesn't have the same nicotine kick.

It's not as satisfying, but they might live longer, and if, in fact, it's safer, they'll live longer just from smoking that safer version of a cigarette. And if, by golly, they don't want it, they the don't like it, and they quit, then they'll be right where Mr. Ulmer says Mr. Nunnally should have been. They will have quit, and they may have

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saved 30, 40, 20, whatever years on their life.

They have a safer cigarette. They've just chosen not to worry about it, not to force it on the public, not to put it out there as the only

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variation you have. How many products can you think of that responsible manufacturers make that they don't give you the choice to buy a deadly one or a safe one? Lawn mowers, you get a riding lawn mower, you get up off of it to go pick up a stick in the yard, it cuts off because it's got a kill switch under the seat.

If you've got a push lawn mower, you turn loose of the handle, it cuts off. Nobody asks you which one you'd rather have, whether you wanted it to be safe or not, but the manufacturer responsibly makes it safe. He doesn't give you a choice on safety. Same thing is true on doors that have interlocks on them. You open the door on your washing machine, you want to put something else in it, it cuts it off. You have to turn it back on.

Responsible manufacturers don't make choices like that in your hands. They make them for you. Mr. David started his remarks to you by saying jury, you're going to have to ask yourself if we were a responsible company. Were they responsible?

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Mr. Ulmer tells you, well, they couldn't advertise, and they couldn't put warnings on at a certain period of time, and he's right. After 1969, what they put on was regulated, but nobody regulated nothing from 1954 to 1966. They could have put anything on those warnings, any warning they wanted. But they could simply have come out in the newspaper and --

MR. LISTON: Please the Court, we object on his comments on warnings which have been excluded by the Court.

MR. MERKEL: And it was pounded --

MR. LISTON: It was before 1969.

MR. MERKEL: And it was pounded and pounded by Mr. David and Mr. Ulmer, Your Honor.

JUDGE CARLSON: On that point, I'll overrule the objection.

MR. MERKEL: On those they could put anything they want there. They told you, Mr. David said there was a swelling controversy going on about is cigarette smoking, is it really deadly, is it really dangerous, is it really a problem? And how could that controversy have been ended, terminated like that by the tobacco companies and R. J. Reynolds coming out saying that's right, it is

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dangerous. It does cause cancer. Instead of saying we don't think it's been scientifically proven that it causes cancer. Is that responsible? Do you think that may cause people like Joe Nunnally to take up this horrible habit, to get addicted to it and to literally kill themselves over a stinking cigarette. It serves no purpose for anybody that's never been addicted to it, and those of us who unfortunately have can't get rid of it.

It serves no purpose. This is a risk utility test that you're to apply. Does the risk outweigh the utility of the product to the user, Mr. Nunnally, but, more importantly, to the public as a whole. The safety aspects of the product, that's again not the end of the statement. The

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statement aspects of the product/the likelihood that it will cause injury, and the probable seriousness of the injury.

We've had products in the marketplace that can cause little harms. You have products that you can cut your fingers with. We have products that can burn you a little bit. There are all kinds of risks and dangers associate with some products. And if the utility of that product is such that it merits undergoing those risks and trying to be

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careful with the product in the way you use it, a pocket knife is a beautiful example, much better than a beer can.

A pocket knife serves useful purposes. You can carve with it. You can open things with it. You can do all sorts of things, and if you slip with it, you can cut your finger. But the utility of that product far outweighs the number of times you're going to cut your finger, and the seriousness of the injury you're going to inflict with it.

Cigarettes, how often is it going to happen? Four out of 10 users are going to die of a disease related to smoking. That's about as serious as it can get. Four out of 10, balanced against what utility? Why? Other than for them to make a profit out of it. Where is there another utile purpose of it? If they disappeared from the face of the earth tomorrow, and there's as easy to quit as their Dr. Seiden and Mr. Ulmer will tell you it is to quit, then within two weeks, we'd never need to the worry about them again.

The only thing that would have changed on the American landscape is R. J. Reynolds wouldn't be making a profit. The air would be cleaner. Clothes wouldn't stink when you'd go into a restaurant or

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someplace where people were smoking. The people who were addicted would be finally off of it forever. We'd have no more deaths from lung cancer. That's the utility of their product. That's the truth about their product.

Now, Mr. Townsend, they want to talk about all the wonderful things that they tried to do. How responsible they were, that they searched out all these carcinogens. Well, we know one that they searched out in 1959, and they buried it for 10 years and three months until 1969, when it was finally stuck into the middle of a 15-page document, cholanthrene, a potent carcinogen. Is that responsible?

He wants to talk about responsible. Was that responsible? The whole scientific world was searching for the reason people are dying of lung cancer. Is it related to cigarettes? It seems to be. That's what the statistics show. But what's in it? Here's one that they found and they buried. And it was 10 years later before the scientific community knew about it, four years after -- five years after the Surgeon General's report came out.

The Surgeon General's report might have been different with that knowledge. Dr. Burns said

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he felt it would have been. That they could only account for two percent of the tumors on the mice with the carcinogens that were known at that time. This one would have added a great deal the more to the body of knowledge.

They want to talk about the society has decreed that this is a wonderful product. And we're going to protect it, and it's legal. Yes, it's legal, but at what cost? How much have they paid to lobby, to promote, to obscure the landscape so that this product will remain legal. So that the public won't realize how bad and deadly it is. From '54 to '66, it took 12 years to get a word of warning out of them on a cigarette pack, and that took an act of Congress. They didn't do that. They fought it like tooth and nail. But finally a watered down version of it may be hazardous to your health went on the packs.

Five years later, it is dangerous to your health. Reasonable, responsible, no. Greedy, selfish, uncaring, yes. That's what they've done. That's what their actions have demonstrated. Sure, they spent a lot of money trying to get rid of the bad things in the cigarette that were killing people. But when they couldn't do it, what did they

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do? While they were spending all that money trying to, what did they do? Business as usual. Sell, sell, sell, a billion dollars of advertising a year to promote new people to come into the smoking world.

They put it out, they spent it, but whether it worked or not, business was going on as usual. They were going to continue to sell the ones that were killing people. And when they came up with modifications and improvements and the public didn't like them, they scrapped them, whether they were safer or not.

Bottom line, net profit. That's the only thing R. J. Reynolds understands is money. They throw it around like water in a case like this. Lawyers by the dozens, support staff all over the place, boards, experts. It's like fighting a bear with a switch, I can assure you. But that's what's going on, and they're still not responsible. No way are they responsible.

Poor Joe Nunnally, he chose. And have you caught the way that they always say when they were asking his old friends, and his family and they're asking their experts, do you think Joe Nunnally knew the risk of smoking? Now, what does

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that term mean? What risk of smoking? The one the 5th grade teacher said it's a bad habit, and it's unpleasant for other people to be around. The one that some of his buddies talked about that we knew we'd get in trouble if we got caught by mama when we were smoking. The ones some scientific journals said were there, but R. J. Reynolds said no, there's no scientific proof of that, or the risk that 40 percent of the people that use it are going to die from it? Which risk of smoking? That's the question, not if he knew some risk.

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Their own expert has told you for a motivating factor to play an influence, it has to be personal, serious and immediate. Not the possibility that some day down the road if you continue to do it, you may have a problem. So that's what we're talking about with the safety aspects of the product.

R. J. Reynolds knew better than anybody on earth, they the bragged to you about they had more designs, and they had more innovations. And they had more different things than anybody else in the industry. And they sure had more scientists than anybody else in the industry. They knew better than anybody in the world the safety aspects of the

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product. The likelihood that it would cause injury and the seriousness of the injury, and the fact that what they were doing was not making it any better.

You also heard Mr. Townsend admit that in 1954, immediately after the mouse study, out came the filters. And they promoted and let the public believe, if the public was worried about smoking and health hazards, that those filters were going to do them a lot of good. In other words, if somebody was sitting there trying to make up his mind should I continue to do it, here it came, bingo, a filter. It was going to be a break through, major break through. Turned out it wasn't anything.

How many people did that stop from quitting at that time? It gave them an alternative, a rationalization in their own minds of what they could do other than quit. That went on. Then we went through expanded tobacco, and reconstituted tobacco. Expanded tobacco, I sort of like that one. This is the one they put freon in, and their own chemist said it shouldn't be in there. There's a residue of it that's left that's dangerous, it causes problems. 20 years later when freon got pulled off the market because it was making a hole in the ozone, then they stopped using it. Is it

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responsible? Is that what you expect a responsible company to do? He said the question for you is are they responsible? And I think the question for you, too, is should they be responsible?

When they recruit a person to the smoking world, in this instance, an eight-year-old, a 12-year-old, whatever, when he's recruited to this by the lure of the fancy advertisements, the nice people that do it to the wonderful world of Salem. Is it fair to bring him into that world, hook him on nicotine and then say shame on you, you shouldn't have let me hook you like that. We wouldn't expect this behavior from a pusher on the streets.

When the person does exactly what they projected he would do, exactly what they wanted him to do, behaves exactly like their model consumer is supposed to behave. And then he's killed at age 36, and they come in here and say shame, shame, it's all his fault. He knew. He knew what last week they still won't admit. Does that seem to be coming out of opposite sides of the same mouth? What's the big deal about admitting that cigarette smoking causes

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cancer? Even the expert, the doctor in here yesterday, when I asked him that question, he gave me the same party line, "Well, I'm say it's a risk.

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It's an increased risk. But I wouldn't tell one of my patients that it causes cancer, because that might reduce the incentive for him to try to quit." He'd think the odds were, what did he say, four out of 10, so he'd think he had six chances, "So, therefore, I don't tell my patients that it causes cancer. I just tell them that it increases the risks."

What's the matter with telling the truth? It does cause cancer, and they've known it does since the early '50s. What kind of game are they playing, this responsible company?

The availability of a substitute product that would meet the same need and not be as unsafe. It doesn't say eliminate the unsafe characteristics like they've misworded it on their board there. It says the manufacturer's ability -- the availability -- number 3. Well, we must have skipped one completely. Yeah, we did. We skipped one completely.

The availability of a substitute product which would meet the same need and not be as unsafe. Do they have one? Is the one percent cigarette, is that a substitute product that's not as unsafe? Sure it is. If it didn't go down but five percent

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or 10 percent, they're the ones telling us that reducing tar was a wonderful breakthrough. That makes them much safer. So number 3, yeah, they can do that. 4, the manufacturer's ability to eliminate the unsafe characteristic of a product without impairing its usefulness or making it too inexpensive to maintain its utility. Well, they went to the Premier, that would eliminate the unsafe characteristic completely. Well, what happened? They didn't sell it. So they just took it off if market, a billion dollars worth of research, and it's gone, because it's not selling.

That eliminated things completely, sold for the same price as other cigarettes. But didn't have the ability to compete in the marketplace with other cigarettes, and there it went. Number 5, Mr. Nunnally's ability to avoid danger by the excise of care of the product. I didn't hear Mr. Ulmer tell us how Mr. Nunnally was supposed to exercise due care. Whether he'd held it out in the middle where he didn't block up the vent holes Dr. Burns told us about, what he was supposed to do.

These apply to the user of the product. They don't apply to people that don't use the product. Product liability law has no application

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to people who don't use a product. All of these are talking about the relationship between a manufacturer, a product, and the consumer or user of that product. And if Mr. Nunnally or anyone was going to use a cigarette, there is no way on earth to avoid danger by the exercise of due care. The only way to avoid danger is to stay away from the

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things completely, which is exactly the opposite of what they want.

Mr. Nunnally's unanticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of a product or the existence of suitable warnings or instructions. So we're back again.

They could have admitted the truth in '54. They could have warned about any aspect of it, from '54 to '66. They didn't need an act of Congress. They didn't have to wait for that. But no, didn't tell anybody anything. They went to work like little beavers in the laboratory out there putting out petunia cigarettes, and expanded tobacco's and all that stuff. They knew they had a problem.

They knew the things were dangerous as

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sin, and they were working away trying to do something, but that was all back behind closed doors. On the outside where Joe Nunnally was, where his buddies were, where people were beginning to smoke everyday and every year, they were still saying no proof, no proof, no scientific proof it causes anything. The atmosphere that people make choices in, that make decisions in, are they advised choices, are they learned choices, are they appropriate choices? No, if you don't have the information that's available, and nobody knows more about his product than a manufacturer does. And a consumer cannot possibly make a choice in the real meaning of choice without that information. But they want to blame Joe Nunnally for his choice.

Finally, the feasibility on the part of the manufacturer of spreading the loss. It's nothing more than the cost of doing business, like the cost of burning tobacco, the cost of a cigarette rolling machine, the billion dollars of advertising costs. It's the cost of being responsible, paying for the injuries and the deaths that you cause if you wish to continue to make your product available to the public. That's choice.

I'll agree with one thing Mr. Ulmer said.

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This is about choice, and it is about responsibility, or it should be about responsibility. It's been far too long coming with responsibility. It is an arrogant group that will tell you they have no responsibility. Poor Joe Nunnally has all the responsibility.

If you think Joe Nunnally was negligent, if you think he behaved differently than a person with his information in that position at that time at his age did, then that's negligence. That's, by definition, what it is. Doing something unreasonable under the circumstances for the person and the events involved. But when you start assigning fault between the two as the Court's instruction tells you to, you've got an uneducated at that time eight, 10, 12-year-old kid pitting his knowledge or his choice and his fault against R. J. Reynolds.

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I don't know what position, what percentage to stick in that block. But I know it's overwhelming what the number is of whose fault is responsible for this tragedy and so many more. They want to talk about witnesses, that they the brought you the finest witnesses, and I agree. They brought you the finest witnesses money can buy. Did you

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think why those particular people?

Dr. Lang, he was a gynecological radiologist. What does that have to do with lungs, and chest and smoking? Nothing. Testified for them six times. Came up here, told us all about what it was, what it wasn't. Said that Dr. Alpert agreed with him, you know, that this was exactly what he said it was. And on cross examination, he didn't even know what Dr. Alpert was talking about.

He had no idea what a PAS test and a PAS with digestion were didn't know whether it was one test or two about the glycogen, remember that? No idea. But the most amazing of it all, first he tells us well, it's a sarcoma, big old fat, 15 centimeter sarcoma, but then we've got this little one down here that's metastatic, and it came from the pancreas. Nobody, anywhere, has ever had a symptom in this case of a pancreatic disorder of any kind. Nobody ever treated it, and he couldn't find it.

In fact, the picture that he showed you, his sliced CT scan, if you recall how it went through, he said well, the pancreas isn't even here, you can't see it. But I'm looking at this little blood vessel that should go in a straight line, and

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it's bent a little like this, so that tells me the pancreas has bulged out. And it's moved that blood vessel, and that's why I'm positive on the pancreas. On cross examination, all of the sudden, up jumped the devil. He admitted most pancreatic patients are dead within three months of being diagnosed with cancer. And here Joe Nunnally lived 10 months after he was diagnosed with lung cancer. And if the pancreas was involved, it had to be going a long time before it metastasized to the lung and grew like that. That's Dr. Lang.

Dr. Bennett came on, and well, on his deposition, Dr. Bennett said well, he thought it metastasized from the kidney, renal. But by the time he got on the stands here, he had heard what Dr. Lang had said yesterday or the day before yesterday, so if you remember, Dr. Bennett started talking about the pancreas, too, never had mentioned it in his deposition. And when I jumped him on it on cross examination, he said well, I didn't say that. I still think the -- you know, the kidney is more likely, but it could be the pancreas.

You know, this is not a game. It's a search for justice and for truth and for right. And just because you can pay somebody a lot of money and

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import them a long way from somewhere doesn't accomplish that purpose. They want to talk about Dr. Burns. Dr. Burns, since 1975, has been a public

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health employee. He's been involved in every Surgeon General's report from 1975 to the latest, 25 years. Yes, he's testified in a lot of tobacco cases because he is the best and the most knowledgeable person there is in this area. He has devoted his life to it. And yes, he probably has a bias, because he's studied it. He knows how evil this thing is. So yes, we got him, and that's all we could afford. But we got him to tell you what he knew about this company, this industry, this problem, whether cigarettes cause cancer, whether they're addictive. Because you've still got to prove all those things. Even today, you have to prove them, because they don't admit them.

So yes, we got Dr. Burns, and Dr. Burns has testified, but he's done it consistently in an area he's devoted his life to and that he firmly believes in. And somehow I feel that's different than a gynecological radiologist and a state medical examiner pathologist. What does state medical examining, doing autopsies on murder victims, what does that have to do to qualify him over any other

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pathologist between Billings, Montana, and here? I don't know. He's very smooth, one of the better witnesses I've ever heard testify, nice spoken, does a good job, smooth as silk. But they all come in here and tell you that the treating physicians don't know what they're talking about.

Treating physicians that didn't get paid a dime for anything. Mr. Ulmer wants to criticize me for not bringing Dr. Fidler down from Memphis to testify. Of course, Mr. Ulmer knows I can't bring Dr. Fidler down from Memphis because I can't subpoena him outside of the state. And he's got no interest in this case. He's not making any money off this case. He testified because he was served with a subpoena up there, and his deposition was taken, not by me, but by Jonathan Engram with R. J. Reynolds. That's who wanted his deposition and who took it.

You'll recall he said he had talked to us about 10 minutes before the deposition started, same with Dr. Alpert. They took her deposition. Same with Dr. Routt that you heard today. You have heard the testimonies of all the real experts, the treaters, the people with absolutely no ax to grind. No reason to shade anything for anybody any way.

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They made a medical decision, and they went to bat by basing their treatment of a dying patient on their best medical judgment.

Put them against the long distance boys, I don't think there's any question who has the correct. And if you'll remember on cross examination, every one of those, Dr. Bennett yesterday, I mean, he was real strong on direct. On cross, he readily acknowledged what was in the textbook, yeah, it said different things from what he did. He acknowledged that Dr. Fidler said different things from what he did. He acknowledged that Dr. Alpert said different things. And you remember he said he thought Dr. Alpert was very

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candid and honest. But she differed with him on virtually everything he said caused this to be a sarcoma.

This was the last question yesterday that Dr. Bennett was asked. You remember that I asked him about the -- wasn't it a fact that Dr. Fidler had said that he didn't believe that the difference in the two, the big tumor, the way it digested, glycogen and the small tumor, that that had anything to do with it. Which, of course, Bennett had already said oh, yes, that means they're two

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separate tumors. Then Mr. Ulmer got back up with him and said did Dr. Fidler even know there was a second tumor there? He didn't even know that when he said it. There's his deposition. "Would you agree that assuming C 4 stained positive for PAS and then was negative after digestion, and that A 8 was negative both before and after, would you agree this difference in staining means the right upper lobe mass and right middle lobe nodule are lesions of different origin?" "No."

Whether he read it or not, Jonathan Engram put it to him there and said assume that for me. "Would that mean they're different lesions?" "No." No equivocation, just flat no.

Leslie Alpert, "Did you consider sarcoma as a possible differential diagnosis for the tissue that you see in A 8?" "Probably not in the possible dose of radiation." Didn't even put it in her differential diagnosis.

"Is there a significance as to whether the tumor is in the lung or primary to the lung or "metastatic?" "Generally speaking, and I emphasize the word generally in the hospital if a tumor is thought to be metastatic, they usually do not resect lung nodules." That means they wouldn't operate.

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If any of them had thought they were metastatic, if any of them had came from the kidney or pancreas or anywhere else, they wouldn't have operated. Finally on her, "The malignant cells which are poorly differed, no small cell, that based on the test that you have available and the things you know even today, would that still be your diagnosis?" "That's sill accurate, yes." That's Dr. Alpert.

Ladies and gentlemen, I don't think there is any question remaining in this case other than the question, possibly, of whether Joe Nunnally, in your opinion, did something unreasonable based on what he knew, what he had available, his age and all of that, the peer pressure, the advertising, the whole ball of wax. And if you think he was negligent, you're going to have to answer that question, and you're going to have to put a percentage in the box.

But aside from that, I feel certain you know cigarette smoking causes lung cancer. You know nicotine is addictive. You know cigarette smoking caused Joe Nunnally's lung cancer. You know that treating physicians are the ones that know what his situation was. All of that clearly, under the Court's instructions and the law, entitles

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Ms. Nunnally and her children to a verdict. What size verdict, again, is a question for you. You've got to read the instructions, and you've got to try to put yourself in a position of making this thing right. We're not here looking for sympathy. Sympathy ended 11 years ago. This family is over the initial sympathy. We're not after sympathy. We've been told we're sorry all we want to be told that. That's not what this is about.

JUDGE CARLSON: You have five minutes.

MR. MERKEL: And it's not totally about money. That's a measure of it. But mainly, it's about what's right. It's about making somebody responsible for what they've been getting away with for too, too long. That's as much Kay Nunnally's desire in this thing as anything else. To make it right, to make responsible people be responsible. No more smoke and mirrors, no more fancy defenses. Everything on earth is something else. It wasn't this, it wasn't that. I don't know what it was, but it sure wasn't squamous cell. I couldn't tell you which of the others. No, it wasn't bronchogenic. I don't know where it came from, the pancreas, the kidney, the stomach, the liver, whatever. But it didn't come from the lung.

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That kind of stuff, it's time, it's time it quit. I added up a figure of five million dollars. Mr. Ulmer hasn't given you anything. But that's your decision, but it needs to make it right. It's time, please, it's time. God knows, it's time.

JUDGE CARLSON: All right. Ladies and gentlemen, in a moment, I'll be able to let you retire to begin your deliberations. Before I do so, I need to make just a few comments to you. As you well know, this case has been tried with four alternates, and I've retained all four alternates due to the length of the trial. And I wanted to make sure we got to this point as far as having 12 jurors to go into the jury room to begin deliberation.

So based on state law, then I'm required to release the alternates at this point when the jury retires to deliberate. But before I make that pronouncement, I want to inquire of the 12 jurors, those of you actually in the jury box, as you know, you are the 12 who will be retiring. Is there any reason any of you know of at this point that would prevent you from going forward to conclusion on this case and deliberating to a verdict? Any of you?

Because it's most important that now at

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this point we have 12 jurors to go through to conclusion. And so I wanted to find out once and for all. Hearing nothing, then I take it all 12 in the jury box are prepared to go forward, and so in a moment, you four alternates, Ms. Collier, Ms. Williams and Mr. Jordan and Ms. Stewart, I'll be able to release you in just a few moments. I'll that you can to you a little more after the jury retires.

Now, to you 12 jurors who will be going

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into the jury room, when you get back into the jury room, if you'll wait until you get everything, it will take a few minutes for the court reporter to inventory the exhibits, make sure they're all accounted for. And then we can get the exhibits back to you and the instructions of law. And we'll have pens and paper for you.

So -- but when you get back there, before you start in your deliberations, you need to decide among yourselves who will be the spokesperson for the jury. You make that decision. That will be the first decision you make. Talk among yourselves, decide who you want to be your spokesperson. Whoever you so designate, that person would have basically three responsibilities. Number one, that

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person would preside over jury deliberations, keep order in the jury room during the course of deliberations.

Secondly, that person would record the verdict, once a verdict has been reached by the jury, and finally, that person would be your spokesperson when you get back here in the jury box with your verdict. I would have two questions for that spokesperson that would require only a yes or no response. So and while you're back there deliberating during the course of your deliberations, it will be just you 12. Nobody can be in that jury room except the 12 jurors. So when you're ready to come out, when you've reached a verdict, if you would, take a separate sheet of paper, write a note to me that you're ready to come out and knock on the door. And the bailiffs will be close by. One of the bailiffs will bring the note to me, I'll read it and see that you're ready to come out.

I'll get the courtroom in order. We'll be here to receive it. I should emphasize, please, do not give the verdict itself to the bailiff. You hold on to it and give a separate note to me.

Regarding time, I'm well aware of the

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time, it's 4:35 by this clock, and up to this point, throughout the roughly three weeks, you've had to rely on me or you had to listen to me say what time to be in Court each morning, and what time to break for lunch, and what time to come back from lunch and what time to go home each day. But now, ladies and gentlemen, it's all in your hands, not only the decision, but the time frame as far as reaching the decision. That's in your hands.

So I say that to you to let you know when you get back into the jury room, you have all those options. You can start deliberating and decide you want to stay until the end if you feel like you can do this afternoon or this evening. That's up to you. At some point, you decide you want supper, dinner, we can bring that in to you. If at some point you say well, I've had enough, we've had enough for the day, we need to come back tomorrow, that's fine, too.

I mean, it's totally up to you. I want to emphasize to you that's your decision to make on

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the time frame regarding the verdict. I want you to have all the time you need in order to consider the case, and that's in your hands also. So at this time, I'll let you retire to the jury room. If you would, wait until we get all the exhibits back to you and the law and pens and papers. Okay.

(Jury exits courtroom.)

(Off the record.)

(Jury begins deliberating at 4:50 p.m.)

JUDGE CARLSON: All right, ladies and gentlemen, I've received your note, and I've informed the attorneys of your note, and basically that you would like to stop here and come back at 8:30 in the morning; is that correct? And certainly that's a fair request, and like I mentioned to you on the front end, I wanted you to make the call on that as far as how you wanted to go about your deliberation.

So in a moment, I will put you in recess for the evening, and I am required, since you have been deliberating to give you these instructions. It's based on rule 3.11 of the Uniform Circuit and County Court Rules that within the discretion of the Court, a recess of jury deliberations may be held. The jury may be reconvened at the time and place set by the Court.

In cases in which the jury is not sequestered, the Judge shall instruct the jury as to the following. Number one, that the jurors are not to converse with anyone, including family members or another juror about the case or on any subject matter connected with the trial. Secondly, that the jurors are not to form or express an opinion on the case or any subject matter connected with the trial.

Third, that the jurors are not to view any place connected with the case or subject connected to the trial. Fourthly, that jurors are not to read, listen to or watch any news accounts or other matter relating to the case or any other subject connected to the trial. The juror shall report to the Court any communications or attempts to communicate with them on the case or subject connected with the trial.

So basically, as you can tell, the same instructions that you have been under throughout the course of the trial whenever there's been a recess, so I do need to remind you of that. Of course, you have been discussing the case during the course of deliberation. But I need to ask now that you no longer discuss the case, even with each other during any overnight recess, like phone calls back and forth. You shouldn't be talking with each other, just stop here, go home, get a good night's rest, and we'll start back in the morning.

So if you would be in the jury room at 8:30 in the morning, and I would ask that once you get back into the jury room, hold up on any further deliberation. Wait until I can get you back in the jury box and talk to you for just a couple of minutes, and then I'll let you go back and continue

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your deliberations. So again, I hope you have a good evening and are able to get rested up. And we'll see you back here at 8:30 in the morning. Thank you.

(Jury exits courtroom.)

JUDGE CARLSON: Court will be in recess until 8:30 in the morning.

(Time Noted: 8:10 p.m.)

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